

FEDERAL COURT

BETWEEN:

UNITED AIRLINES, INC.

Plaintiff

– and –

DR. JEREMY COOPERSTOCK

Defendant

**AMENDED MOTION RECORD OF THE MOVING PARTY,
THE DEFENDANT**

**(Refusals – Examination for Discovery of Plaintiff's Representative,
Mr. Scott Albert Wilson, Conducted on October 2, 2013)**

Dated: May 21, 2014

DR. JEREMY COOPERSTOCK
392 Grosvenor Avenue
Westmount, Québec H3Z 2M2
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Defendant / Moving Party

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**Solicitor for the Plaintiff,
United Airlines, Inc.**

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Court File No.: T-2084-12

FEDERAL COURT

BETWEEN:

UNITED AIRLINES, INC.

Plaintiff

– and –

DR. JEREMY COOPERSTOCK

Defendant

NOTICE OF MOTION

TAKE NOTICE THAT Dr. Jeremy Cooperstock will make a motion to the Court under Rules 97, 240, and 241 of the *Federal Court Rules*, S.O.R./98-106. at a date to be set by the Case Management Prothonotary.

THE MOTION IS FOR:

1. an Order compelling the Plaintiff's representative, Mr. Scott Wilson, to re-attend, at the expense of the Plaintiff, for an examination for discovery, to answer the proper questions asked during his examination for discovery conducted on October 2, 2013 but that were not yet answered;
2. an Order awarding costs of this motion to the defendant; and
3. such further and other relief as this Honourable Court may deem just.


THE GROUNDS FOR THE MOTION ARE:

1. The Plaintiff refused to provide answers to the relevant questions set out in the Refusals Chart, **[Tab 5]**, included in the Defendant's Motion Record.
2. Rules 97 and 240 of the *Federal Court Rules*, S.O.R./98-106.
3. Such further and other grounds as this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used for the motion:

1. Excerpts of the transcript of the examination for discovery of Mr. Scott Wilson, dated October 2, 2013, **[Tab 6B]**.
2. The extract of the Plaintiff's responses to undertakings, provided November 25, 2013, **[Tab 6F]**.
3. The testimony of Mr. Jeff Wittig, dated April 28, 2014, **[Tab 6G]**.
4. The Refusals Chart, **[Tab 5]**.

May 21, 2014


DR. JEREMY COOPERSTOCK
392 Grosvenor Avenue
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jcooperstock@gmail.com

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**Solicitor for the Plaintiff,
United Airlines, Inc.**

FEDERAL COURT

**BETWEEN: UNITED AIR LINES AIRLINES, INC. and
 —CONTINENTAL AIRLINES, INC.**

**Plaintiffs
Plaintiff**

AND

JEREMY COOPERSTOCK

Defendant

AMENDED STATEMENT OF CLAIM

TO THE DEFENDANT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiffs. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a solicitor acting for you are required to prepare a statement of defence in Form 171B prescribed by the *Federal Courts Rules*, serve it on the Plaintiff's solicitor or, where the Plaintiffs does not have a solicitor, serve it on the Plaintiffs, and file it, with proof of service, at a local office of this Court, **WITHIN 30 DAYS** after this statement of claim is served on you, if you are served within Canada.

If you are served in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period for serving and filing your statement of defence is sixty days.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO DEFEND THIS PROCEEDING, judgment may be given against you in your absence and without further notice to you.

Date: November 19, 2012
Amended April • , 2013

Issued by:

 (Registry Officer)
 30 McGill Street
 Montreal, Quebec
 H2Y 3Z7

To: PROFESSOR JEREMY COOPERSTOCK
392 Grosvenor Street
Westmount
Quebec
H3Z 2M2

The Plaintiff, United Airlines, Inc. claims: ~~Plaintiffs, United Air Lines, Inc. (hereinafter called "United") and Continental Airlines Inc. (hereinafter called "Continental") (United and Continental hereinafter collectively called the "Plaintiffs")~~ claim,

- (a) a declaration that ~~Continental~~ the Plaintiff is the owner of the copyright in Canada in the graphic design elements, including layout, incorporated in the website corresponding with the internet domain name www.united.com (these graphic design elements and layout are hereinafter collectively called the "United Website");

- (b) a declaration that the ~~Plaintiffs are~~ Plaintiff is the ~~owners~~ owner of the copyright in Canada in the logo: **UNITED**

(hereinafter called the "United Logo");

- (c) a declaration that ~~Continental~~ the Plaintiff is the owner of the copyright in Canada in the logo:



(hereinafter called the "Globe Design");

- (d) a declaration that United the Plaintiff is the owner of the Canadian registered trade-marks UNITED, GLOBE DESIGN and UNITED AIRLINES bearing trade-mark registration nos. TMA204,456, TMA492,886 and TMA367,179, respectively (collectively hereinafter called the "United Trade-marks"); (e) ~~a declaration that Continental is the owner of the Canadian registered trade mark GLOBE DESIGN bearing trade mark registration no. TMA492,886 (this trade mark and the United Trade marks hereinafter collectively called the "Plaintiffs' Plaintiff's Trade-marks")~~;

- (f) a declaration that the Defendant, Professor Jeremy Cooperstock (hereinafter called the "Defendant"), has:
- (i) infringed the ~~Plaintiffs'~~ Plaintiff's copyrights in the United Website, in the United Logo and in the Globe Design;
 - (ii) directed public attention to his wares, services, and business in such a way as to cause or be likely to cause confusion in Canada between them and the wares, services and business of the ~~Plaintiffs~~ Plaintiff;
 - (iii) infringed the ~~Plaintiffs'~~ Plaintiff's rights in the ~~Plaintiffs'~~ Plaintiff's Trade-marks;
 - (iv) used the ~~Plaintiffs'~~ Plaintiff's Trade-marks in a manner that is likely to have the effect of depreciating the value of the goodwill attaching thereto; and
 - (v) caused confusion to the public and ongoing damage to the ~~Plaintiffs~~ Plaintiff, including depreciation of the ~~Plaintiffs'~~ Plaintiff's goodwill in the ~~Plaintiffs'~~ Plaintiff's Trade-marks;
- (g) an interim, interlocutory and permanent injunction restraining the Defendant from, either directly or indirectly, further infringing the ~~Plaintiffs'~~ Plaintiff's said copyrights and from further directing public attention to his wares, services and business in a confusing manner as set out above, and, in particular, from using or displaying, on the internet or in any other way, the ~~Plaintiffs'~~ Plaintiff's Trade-marks or any symbols, logos, words or indicia which cause or are likely to cause confusion with any of the ~~Plaintiffs'~~ Plaintiff's Trade-marks;
- (h) damages, profits and statutory damages, or whichever one or more of those that the ~~Plaintiffs~~ Plaintiff may elect after due inquiry; and
- (i) such further and other relief as to this Honourable Court shall seem just.

The ~~Plaintiffs are~~ Plaintiff is not seeking to prevent the Defendant from operating a website where individuals can express their views about ~~Plaintiffs~~ the Plaintiff. Rather, ~~Plaintiffs are~~ the Plaintiff is requesting the relief above in order to protect ~~their~~ its intellectual property rights and prevent consumer confusion over whether ~~Plaintiffs own~~

the Plaintiff owns and/or ~~spenser~~ sponsors Defendant's UNTIED.com website. As set out in paragraphs 19, 21, and 23 below, ~~Plaintiffs~~ the Plaintiff approached Defendant on multiple occasions with a request that Defendant modify his website so that it is not confusingly similar to the United Website. The Defendant refused to do so. Accordingly, ~~United~~ the Plaintiff is left with no reasonable option but seek relief from this Court.

The Parties

1. Plaintiff, ~~United Air Lines~~ Airlines, Inc., is a corporation incorporated and existing under the laws of the State of Delaware, one of the United States of America, having a principal place of business at ~~77 West~~ 233 South Wacker Dr., Chicago, Illinois ~~60601~~ 60606, U.S.A.
2. The Plaintiff, is the result of the merger of United Air Lines, Inc. ("United") and Continental Airlines, Inc., is a corporation incorporated and existing under the laws of the State of Delaware, one of the United States of America, having a principal place of business at 77 West Wacker Dr., Chicago, Illinois 60601, U.S.A. ("Continental"), which merger took effect on March 31, 2013.
3. The Plaintiffs operate Prior to the March 31, 2013 merger, United and Continental had operated commercial flights under a single operating certificate and ~~market~~ marketed such flights as "United".
4. For over eighty years, ~~United~~ the Plaintiff, together with its successors in interest, has been one of the largest commercial airline operators and transportation service providers in the world. Indeed, ~~United~~ the Plaintiff (together with United Express) operates an average of 5,557 flights a day to 378 airports on six continents. The Plaintiff ~~United~~ was rated the world's most admired airline on FORTUNE magazine's 2012 airline-industry list of the World's Most Admired Companies. In addition, readers of Global Traveler magazine have voted ~~United's~~ the Plaintiff's MileagePlus program the best frequent flyer program for eight consecutive years.

5. The Plaintiff United and its predecessors in interest have been offering airline related services in Canada for over 70 years. In 2011, United the Plaintiff operated more than 2 million flights and carried approximately 142 million passengers to destinations around the world. United the Plaintiff employs more than 85,000 people worldwide.
6. The Defendant is an individual having an office at McGill University, McConnell Engineering Building, Rm. 424, 3480 University Street, Montreal, Quebec, H3A 0E9, and residing at 392 Grosvenor Street, Westmount, Quebec, H3Z 2M2.
7. The Defendant owns and operates a website corresponding with the internet domain name www.untied.com (this website hereinafter called "UNTIED.com"). Defendant registered this domain name on April 24, 1997. The Defendant began operating said website on the following day.

The United Copyright Works

8. ~~Plaintiffs are~~ The Plaintiff is the owners owner of all rights, including copyright, in the United Website the United Logo, and the Globe Design.
9. ~~Plaintiffs~~ The Plaintiff's predecessors in title have obtained copyright registrations in Canada under the numbers 1099767, 1099766 and 1099765 for the United Website, the United Logo and the Globe Design, respectively. Appended as Schedule "A" to form an integral part of the present action is a copy of each registration.
10. The United Website was first published in Canada when it was launched in its current form on or about March 3, 2012. This launch was the result of a significant redesign of the previous version of the website www.united.com and is based upon the version of the website that existed at www.continental.com.

The United Trade-marks

11. ~~Plaintiffs~~ The Plaintiff and ~~their~~ its predecessors in interest have used the trade-marks UNITED and UNITED AIRLINES in Canada in association with, inter

alia, air transportation of passengers since at least as early as 1939. These two trade-marks have been registered with the Canadian Trade-marks Office under registration nos. TMA204,456 and TMA367,179, respectively.

12. ~~Plaintiffs~~ The Plaintiff and ~~their~~ its predecessors in interest have used the trade-mark GLOBE DESIGN in Canada in association with, inter alia, airline transportation services for passengers since at least as early as June 22, 1995. More specifically, ~~Plaintiff~~ Continental previously used the trade-mark GLOBE DESIGN in association with Continental-branded flights; ~~it~~ the Plaintiff now uses this trade-mark in association with United-branded flights. This trade-mark has been registered with the Canadian Trade-marks Office under registration no. TMA492,886. Appended as Schedule "B" to form integral part of the present action are copies of the ~~Plaintiffs'~~ Plaintiff's Trade-mark registrations 204,456, 367,179 and 492,886.
13. The ~~Plaintiffs~~ Plaintiff and ~~their~~ its predecessors in ~~title have~~ interest have used the ~~Plaintiffs'~~ Plaintiff's Trade-marks extensively in Canada, and the ~~Plaintiffs have~~ Plaintiff has established a very valuable reputation and goodwill in association with the ~~Plaintiffs'~~ Plaintiff's Trade-marks.
14. To enable ~~their~~ its customers, and the general public, to readily associate the United Website with ~~United~~ the Plaintiff, the ~~Plaintiffs~~ Plaintiff prominently display the ~~Plaintiffs'~~ Plaintiff's Trade-marks on the United Website.

The Defendant's Acts

15. At some time between March 3, 2012 and April 9, 2012, the Defendant caused UNTIED.com to be redesigned. The newly designed UNTIED.com site very closely resembles the recently redesigned United Website. Amongst other things, the colour scheme, font, general website layout, and prominent placement of the logo , which is confusingly similar with the United Logo and the Globe Design, are all nearly exactly the same on both the United Website and the new version of UNTIED.com. All of the ~~Plaintiffs'~~ Plaintiff's Trade-marks, and/or indicia

confusingly similar therewith, appear on the redesigned version of UNTIED.com. This results in UNTIED.com having an overall appearance which very closely resembles and is difficult to distinguish from that of the United Website.

16. UNTIED.com allows visitors to the site to submit complaints. For at least one visitor, the Defendant assigned an Untied.com complaint number to the visitor's complaint and instructed the visitor to use the complaint number in correspondence with United the Plaintiff. However, since United the Plaintiff does not operate UNTIED.com, it did not receive this visitor's complaint and did not assign a complaint number to the visitor. As a result, the visitor subsequently contacted United the Plaintiff, noted that he had registered an online complaint via UNTIED.com, but he had not received a response from United the Plaintiff. This example is one of many situations where customers have evidenced confusion between the United Website and UNTIED.com.

17. A link on the UNTIED.com website, which link was removed following the filing of the Plaintiff's November 19, 2012 Statement of Claim, also served to divert ~~diverts~~ users to the commercial website www.inweddingdress.com, which advertises and sells wedding dresses and related clothing and accessories. Additionally, the June 15, 2012 version of the UNTIED.com website was also linked to the commercial website www.uspassportnow.com, an online passport agency. A further link on UNTIED.com directs visitors to a page which offers users the opportunity to send money to the Defendant, either electronically, either electronically ~~to the account corresponding with the Defendant's personal university email address~~, or by cheque. At the time of filing of the Plaintiff's November 19, 2012 Statement of Claim, the Defendant had encouraged users to send money electronically to an account corresponding with the Defendant's personal university email address, which address has since been removed. Defendant expressly states on his website that donations "serve primarily as a means of encouragement."

18. During or about April of 2012, ~~Plaintiffs~~ the Plaintiff became aware of the strong resemblance between its recently launched United Website and the then-recently redesigned UNTIED.com.
19. On July 16, 2012, ~~United~~ the Plaintiff contacted the Defendant to request, among other things, that the appearance of UNTIED.com be altered so as to alleviate the possibility of confusion between UNTIED.com and the United Website.
20. On July 17, 2012, the Defendant acknowledged receipt of ~~United's~~ the Plaintiff's request, and stated that he would "study" ~~United's~~ the Plaintiff's concerns. At that time, and instead of addressing the specific requests made by ~~United~~ the Plaintiff, the Defendant also offered his services to ~~United~~ the Plaintiff "on a consultancy basis."
21. On September 10, 2012, ~~United~~ the Plaintiff again contacted the Defendant to reiterate its earlier request that the Defendant alter the appearance of UNTIED.com, and to formally put the Defendant on notice of ~~United-the~~ Plaintiff's rights. Appended as Schedule "C" is a copy of the September 10, 2012 letter. Specifically, ~~United~~ the Plaintiff stated:

Given the use of United Airlines' trade dress and its copyrighted and trademarked materials, and the intermingling of the untied.com and united.com websites caused by your linking to web pages within the united.com site, it is not surprising that we have received several reports of individuals who have accessed and used your untied.com website, believing that they were on a website owned and/or sponsored by United Airlines. Such individuals have submitted statements or complaints through your website, believing they were being submitted directly to United Airlines. As a result of the confusion caused by your website, the communications from these customers to United Airlines have been delayed, or sometimes even lost. In addition, the amount of time between when these customers thought they were communicating with United Airlines and the time when they actually began communicating with United Airlines has been delayed to their detriment.

22. On September 25, 2012, the Defendant responded to ~~United~~ the Plaintiff's September 10, 2012 letter but did not address ~~United~~ the Plaintiff's request that the Defendant alter the appearance of UNTIED.com.
23. On October 2, 2012, ~~United~~ the Plaintiff once again contacted the Defendant to reiterate its earlier request that the Defendant alter the appearance of UNTIED.com. Appended as Schedule "D" is a copy of the October 2, 2012 letter. Specifically, ~~United~~ the Plaintiff stated:

[T]he design of your untied.com site closely mimics the design of United Airlines' united.com website down to color, font, and location of active links. United Airlines' customers have experienced a great deal of confusion due to the very similar look and feel of your untied.com site and United Airlines' united.com site. Additionally, communications submitted by United Airlines' customers via untied.com are sometimes lost or not directed through the appropriate channels, thus impeding the communication flow between United Airlines and its customers. As a result, we remain concerned about your use of United Airlines' trade dress and copyrighted and trademarked materials on your site.
24. On October 12, 2012, the Defendant responded to ~~United's~~ the Plaintiff's October 2, 2012 letter but once again did not address ~~United's~~ the Plaintiff's request that the Defendant alter the appearance of UNTIED.com.
25. To date, the Defendant has not altered the overall visual appearance of UNTIED.com, or removed any of the indicia which are confusing with or identical to ~~Plaintiffs'~~ the Plaintiff's Trade-marks and the United Logo and Globe Design.
26. The Defendant's aforesaid acts were performed without the ~~Plaintiffs'~~ Plaintiff's authorization, consent, license, or acquiescence to same.

Copyright Infringement

27. By the actions set out in paragraphs 15 to 26, the Defendant has infringed the ~~Plaintiffs'~~ Plaintiff's copyrights in the United Website and the United Logo and Globe Design.
28. The Defendant, by reason of his aforesaid activities, has infringed the copyright in the works owned by the ~~Plaintiffs~~ Plaintiff in that he has produced or reproduced, caused to be produced or reproduced, or authorized the production, reproduction or adaptation of the ~~Plaintiffs'~~ Plaintiff's protected works, or a substantial part thereof, contrary to section 3 and 27 of the *Copyright Act*.

Trade-mark Infringement and Passing Off

29. The Defendant, by reason of his aforesaid activities, has infringed the ~~Plaintiffs'~~ Plaintiff's rights in the ~~Plaintiffs'~~ Plaintiff's Trade-marks, in a manner that has had, or is likely to have, the effect of depreciating the value of the goodwill attaching to the ~~Plaintiffs'~~ Plaintiff's Trade-marks, the whole contrary to sections 19, 20(1) and 22(1) of the *Trade-marks Act*. Also by these actions, the Defendant has directed public attention to his wares, services or business in such a way as to have caused, or to be likely to cause, confusion in Canada between his wares, services or business and the wares, services or business of the ~~Plaintiffs~~ Plaintiff, the whole contrary to section 7(b) of the *Trade-marks Act*.
30. The Defendant is likely to continue the aforesaid illegal and infringing acts, the whole to the prejudice of the ~~Plaintiffs~~ Plaintiff and the public, as aforesaid, unless restrained by Order of this Honourable Court.
31. By reason of the Defendant's aforesaid activities, the ~~Plaintiffs have~~ Plaintiff has suffered and ~~continue~~ continues to suffer considerable damages whereas the Defendant has made and continues to make illegal profits.
32. The present action is well founded in fact and law.

The ~~Plaintiffs propose~~ Plaintiff proposes that this action be tried in Montreal.

Montreal, this 19th day of November, 2012.

Amended April • , 2013

Gowling Lafleur Henderson LLP
Solicitors for the ~~Plaintiffs~~ Plaintiff
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Montreal, Québec, Canada, H3B 3P4

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Schedule "A"



Office de la propriété
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Canadian
Intellectual Property
Office

An Agency of
Industry Canada

17

Certificate of Registration of

Copyright

Certificat d'enregistrement du

Droit d'auteur

This Certificate of Registration is issued pursuant to sections 49 and 53 of the Copyright Act. The copyright in the work described below was registered on the date of registration as follows:

Ce certificat d'enregistrement est émis conformément aux articles 49 et 53 de la Loi sur le droit d'auteur. Le droit d'auteur sur l'oeuvre décrite ci-dessous, a été enregistré à la date d'enregistrement comme suit :

Date of Registration - Date d'enregistrement :

October 29, 2012

Registration No. - Numéro d'enregistrement

1099765

First Publication - Première publication :

February 1, 1991

Houston, Texas, United States of America

Title - Titre :

Globe design

Category - Catégorie :

Artistic

Owner(s) - Titulaire(s) :

**Continental Airlines, Inc.
1600 Smith Street
Houston, Texas
United States of America, 77002**

Author(s) - Auteur(s) :

Steven Gilliat

Roger van den Bergh

Connie Birdsall

Canada

(CIPO 00200)
03-11

OPIC  CIPO



Office de la propriété
intellectuelle
du Canada

Un organisme
d'Industrie Canada

Canadian
Intellectual Property
Office

An Agency of
Industry Canada

18

Date of Issuance of Certificate - Date d'émission du certificat :

October 29, 2012

Registrar of Copyright
Copyright office

Registraire des droits d'auteur
Bureau du droit d'auteur



1099765

Canada

(CIP0 00200)
03-11

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Canadian
Intellectual Property
Office

An Agency of
Industry Canada

19

*Certificate of Registration of
Copyright*

*Certificat d'enregistrement du
Droit d'auteur*

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Date of Registration - Date d'enregistrement : **October 29, 2012**

Registration No. - Numéro d'enregistrement : **1099766**

First Publication - Première publication : **August 11, 2010
Houston, Texas, United States of America**

Title - Titre : **United logotype**

Category - Catégorie : **Artistic**

Owner(s) - Titulaire(s) : **United Air Lines, Inc.
77 W. Wacker Drive
Chicago, Illinois
United States of America, 60601**

**Continental Airlines, Inc.
1600 Smith Street
Houston, Texas
United States of America, 77002**

Author(s) - Auteur(s) : **Su Mathews**

Connie Birdsall

Canada

(CIPQ 00200)
03-11

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Industry Canada

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Date of Issuance of Certificate - Date d'émission du certificat :

October 29, 2012

Registrar of Copyright
Copyright office

Registraire des droits d'auteur
Bureau du droit d'auteur



1099766

Canada

(CIPO 00200)
03-11

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*Certificate of Registration of
Copyright*

*Certificat d'enregistrement du
Droit d'auteur*

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Ce certificat d'enregistrement est émis conformément aux articles 49 et 53 de la Loi sur le droit d'auteur. Le droit d'auteur sur l'oeuvre décrite ci-dessous, a été enregistré à la date d'enregistrement comme suit :

Date of Registration - Date d'enregistrement : **October 29, 2012**

Registration No. - Numéro d'enregistrement : **1099767**

First Publication - Première publication : **July 29, 2006**
Houston, Texas; United States of America

Title - Titre : **INTERNET WEBSITE CONTENT
INCLUDING, WITHOUT LIMITATION:
(TEXT, IMAGES, DESIGNS, LAYOUT,
FONT COLOUR SELECTION) AT
DOMAIN : WWW.united.com**

Category - Catégorie : **Artistic**

Owner(s) - Titulaire(s) : **Continental Airlines, Inc.
1600 Smith Street
Houston, Texas
United States of America, 77002**

Author(s) - Auteur(s) : **Michael Van Auken

Kathryn Van Auken

Aaron Hynes

Nora Bush**



Office de la propriété
intellectuelle
du Canada

Un organisme
d'Industrie Canada

Canadian
Intellectual Property
Office

An Agency of
Industry Canada

22

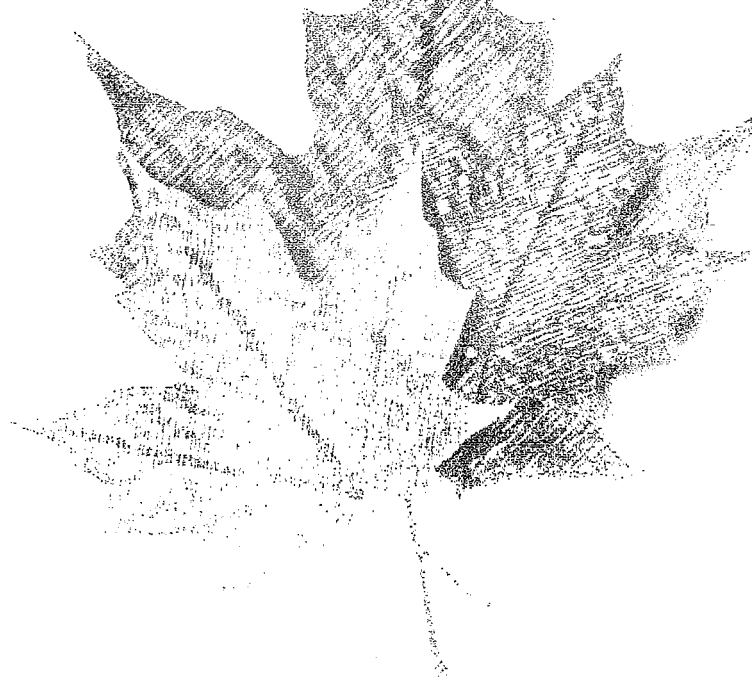
Michelle Bottomley

Date of Issuance of Certificate - Date d'émission du certificat :

October 29, 2012

Registrar of Copyright
Copyright office

Registraire des droits d'auteur
Bureau du droit d'auteur



1099767

Canada

(CIPO 00200)
03-11

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Schedule "B"



Marques de commerce
Certificat d'authenticité

Le(la) soussigné(e) certifie par la présente que le document ci-joint est une copie authentique de l'enregistrement officiel de la marque de commerce effectué sous le numéro TMA 204,456 conformément à la Loi sur les marques de commerce.

Conformément aux dispositions de la *Loi sur les marques de commerce*, la présente marque de commerce est enregistrée pour 15 années à compter de la date d'enregistrement ou de la dernière date de renouvellement indiquée dans le document ci-joint, qui contient tous les renseignements sur l'enregistrement.

Trade-marks
Certificate of Authenticity

The undersigned hereby certifies that the attached document is a true copy of the record of the registration of the trade-mark registered under No. TMA 204,456 in accordance with the Trade-marks Act.

In accordance with the provisions of the *Trade-marks Act*, this trade-mark is registered for 15 years from the registration date or the latest renewal date shown on the attached particulars of registration.

UNITED


Agent certificateur / Certifying Officer

29 oct/Oct 2012

Date

Canada

(CIPO 00200)
03-11

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Marques de commerce

Certificat d'authenticité

Le(la) soussigné(e) certifie par la présente que le document ci-joint est une copie authentique de l'enregistrement officiel de la marque de commerce effectué sous le numéro TMA 367,179 conformément à la Loi sur les marques de commerce.

Conformément aux dispositions de la *Loi sur les marques de commerce*, la présente marque de commerce est enregistrée pour 15 années à compter de la date d'enregistrement ou de la dernière date de renouvellement indiquée dans le document ci-joint, qui contient tous les renseignements sur l'enregistrement.

Trade-marks

Certificate of Authenticity

The undersigned hereby certifies that the attached document is a true copy of the record of the registration of the trade-mark registered under No. TMA 367,179 in accordance with the Trade-marks Act.

In accordance with the provisions of the *Trade-marks Act*, this trade-mark is registered for 15 years from the registration date or the latest renewal date shown on the attached particulars of registration.

UNITED AIRLINES


Agent certificateur / Certifying Officer

29 oct/Oct 2012

Date

Canada

(CIP0 00200)
03-11

OPIC  CIPO



Marques de commerce
Certificat d'authenticité

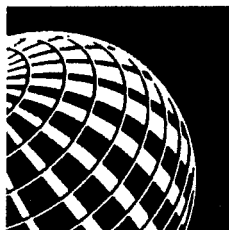
Le(la) soussigné(e) certifie par la présente que le document ci-joint est une copie authentique de l'enregistrement officiel de la marque de commerce effectué sous le numéro TMA 492,886 conformément à la Loi sur les marques de commerce.

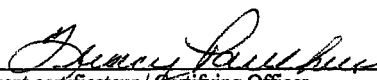
Conformément aux dispositions de la *Loi sur les marques de commerce*, la présente marque de commerce est enregistrée pour 15 années à compter de la date d'enregistrement ou de la dernière date de renouvellement indiquée dans le document ci-joint, qui contient tous les renseignements sur l'enregistrement.

Trade-marks
Certificate of Authenticity

The undersigned hereby certifies that the attached document is a true copy of the record of the registration of the trade-mark registered under No. TMA 492,886 in accordance with the Trade-marks Act.

In accordance with the provisions of the *Trade-marks Act*, this trade-mark is registered for 15 years from the registration date or the latest renewal date shown on the attached particulars of registration.




Agent certificateur / Certifying Officer

29 oct/Oct 2012

Date

Canada

(CIPO 00200)
03-11

Schedule "C"

UNITED

Michael C. Henning
Managing Counsel - Litigation & Intellectual Property
(713) 324-5103
(713) 324-5161 (fax)
mike.henning@united.com

15th Floor HQSLG
1600 Smith Street
Houston, Texas 77002
united.com

September 10, 2012

VIA E-MAIL

Without Prejudice

Jeremy Cooperstock
McGill University
McConnell Engineering Building, Rm 424
3480 rue University
Montreal H3A 0E9 Quebec
CANADA
jcooperstock@gmail.com

Re: untied.com

Dear Professor Cooperstock:

I write as a follow up to our earlier communications. As you know, I am one of United Airlines' in-house attorneys. The purpose of this letter is to continue our discussion about two issues that exist with respect to your untied.com website in hopes of getting them resolved.

To be clear, United Airlines is in no way suggesting by this letter that you may not criticize United Airlines and maintain a website on which such criticisms are collected and posted. While United Airlines certainly believes that there are far more productive ways to address the concerns raised on your website, the purpose of this letter is not to ask you to take down the untied.com site. Rather, it is to see if we can reach an agreement to resolve two specific problems that your website has created for United Airlines' customers and its employees.

The first issue concerns the actual confusion and likelihood of confusion that results from the current layout and appearance of the web pages presented by the untied.com website. As I am sure you know, the overall look and feel of the website you established at untied.com mimics the United Airlines website at the united.com site down to color, font, and location of active links. The untied.com website is also intermingled with the united.com website in that pages provided by the untied.com site include links that take one directly to pages on the united.com website.

Given the use of United Airlines' trade dress and its copyrighted and trademarked materials, and the intermingling of the untied.com and united.com websites caused by your linking to web pages within the united.com site, it is not surprising that we have received several reports of individuals who have accessed and used your untied.com website, believing that they



were on a website owned and/or sponsored by United Airlines. Such individuals have submitted statements or complaints through your website, believing they were being submitted directly to United Airlines. As a result of the confusion caused by your website, the communications from these customers to United Airlines has been delayed, or sometimes even lost. In addition, the amount of time between when these customers thought they were communicating with United Airlines and the time when they actually began communicating with United Airlines has been delayed to their detriment.

The second and particularly troubling issue concerns your posting – on a page on the untied.com website under the tagline “Contact UAL” – of names, office and e-mail addresses, and phone numbers of various specific United Airlines employees who have no connection to any issue discussed on your website. As a result of your postings, the individuals listed on your website have received an inordinately large number of e-mails and phone calls, many of an extremely disturbing nature. Not only are these e-mails and calls extremely disruptive, they have caused – and are causing – tremendous emotional strain and stress for these individuals. While we understand that you are a critic of United Airlines, we are sure that facilitating the harassment of individual employees simply trying to do their jobs is not your intent, and that you will have no issues with removing their names and contact information. There is simply no legitimate reason to subject them to the burdens and stress that listing their names on your website has imposed on them.

To give you an idea of the type of issues that the untied.com listings have caused, I have reproduced below portions of a transcript of a voicemail message left by someone who accessed the untied.com website and obtained an employee’s direct phone number from the “Contact UAL” page:

How come you’re so – uh...uh – familiar with untied.com but you are unwilling to talk to – uh – a member the public about a matter of great interest to United Airlines regarding litigation.

What the hell is wrong with [NAME REDACTED]? And how is that different from what is wrong with United Airlines? And how does that differ with what is wrong from the rogue, renegade, lying US government – the former national – I am sorry – the former constitutional republic and current national security state. What’s the matter [NAME REDACTED]? Traitor got your tongue?

[NAME REDACTED] would you have made a great Nazi – or just a good one?

Do you remember 80 years ago when the German government and media told everyone whom to hate and blame and once everybody knew that everybody knew that everybody knew whom it was not just socially acceptable but expected to amass hate and blame. How it would seem make perfect sense for that nation’s military to go marauding around the world, invading sovereign nations, starting wars all in the name of protecting and defending the fatherland. Of course, you

September 10, 2012
Page 3

UNITED



being female you understand that we're far more progressive this time around. We use the gender-neutral term "homeland" to accomplish the exact same evil thing.

...

So maybe that that judge who that said that UAL should – uh – be on the hook for 9/11 isn't – uh – I don't know – part of the same treason party.

Untie yourself [NAME REDACTED]. You the one who needs to be untied.

Considering the content of the message partially reproduced above, you may begin to appreciate the negative impact that your website content has had on the listed United Airlines employees – employees who have no meaningful connections to the criticisms and issues raised on your website. Again, I'm sure this is not your intent, and you therefore will have no concerns with removing all such names and information.

As you will appreciate, the two issues raised above are of significant concern for United Airlines, its customers, and its employees. While there are legal avenues that United Airlines can take to address these concerns, we believe that it would be more productive and beneficial for us both to see if we can reach an agreement to avoid the likelihood of confusion that currently exists with respect to the untied.com website and address the significant concerns raised above with respect to the identified United Airlines employees. In that regard, I invite you to either arrange a call or a face-to-face meeting with me at a mutually convenient location to discuss a resolution of these issues.

Please let me know by September 28, 2012 if you are interested in arranging a call or meeting. If I do not hear from you by that date, I will assume that you do not want to try to work these issues out, and United Airlines will be forced to consider other avenues for resolving these issues.

As a final matter, United Airlines' management has considered the proposal you advanced in an earlier e-mail. You may recall, in that proposal – in response to our initial concerns – you offered your services to United Airlines' management "on a consultancy basis." If you were offering to meet, on a no fee basis, with representatives of United Airlines to discuss thoughts and ideas that you may have to make improvements in its relationships with United Airlines' customers and employees, I would be happy to arrange such a meeting. However, if your proposal was a suggestion that United Airlines retain you as a paid consultant, you surely will understand that we must respectfully decline such an offer. Given the history of your untied.com website, United Airlines does not want to create any appearance or suggestion that it has made payments to stifle the criticisms offered on untied.com, which is simply not United Airlines' practice.

I look forward to talking with you.

September 10, 2012
Page 4

UNITED



Sincerely,

A handwritten signature in black ink, appearing to read "Mike H." followed by a long horizontal stroke.

Michael C. Henning

September 10, 2012
Page 5

UNITED



bc: Mark Bergsrud
Elaine Clark
Christen David
Rich Fiore
Nene Foxhall
Brett Hart
Rahsaan Johnson
Megan McCarthy
Kevin McKenna
Dave Messing
Karin Moan
Scott Moga
Jessica Rossman
Nancy Tibbitts
Ben Vaughn
Scott Wilson
Jeff Wittig
United Airlines

Schedule "D"

UNITED



Michael C. Henning
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(713) 324-5161 (fax)
mike.henning@united.com

15th Floor HQSLG
1600 Smith Street
Houston, Texas 77002
united.com

October 2, 2012

VIA E-MAIL

Without Prejudice

Jeremy Cooperstock
McGill University
McConnell Engineering Building, Rm 424
3480 rue University
Montreal H3A 0E9 Quebec
CANADA
jcooperstock@gmail.com

Re: untied.com

Dear Professor Cooperstock:

Thank you for your e-mail of September 25. I appreciate the information you provided and do hope that our dialogue will assist in resolving the concerns that United Airlines has had with untied.com and the confusion that our United Airlines customers have had upon visiting your site. Unfortunately, I was disheartened that you did not address the two concerns that I mentioned in my September 10 correspondence to you. First, as mentioned in my letter, the design of your untied.com site closely mimics the design of United Airlines' united.com website down to color, font, and location of active links. United Airlines' customers have experienced a great deal of confusion due to the very similar look and feel of your untied.com site and United Airlines' united.com site. Additionally, communications submitted by United Airlines' customers via untied.com are sometimes lost or not directed through the appropriate channels, thus impeding the communication flow between United Airlines and its customers. As a result, we remain concerned about your use of United Airlines' trade dress and copyrighted and trademarked materials on your site.

Second, the names of and contact information for several United Airlines employees are still listed on the "Contact UAL" link of untied.com. As mentioned in my September 10 letter, these employees have received extremely disruptive and harassing messages as a result of your posting of their information on untied.com. These individuals have no connection to the issues discussed on your site but nevertheless are being subject to significant stress and burdens as a result of being listed as contacts on your site. I therefore am again requesting that you remove their names from your site. Moreover, although you requested information pertaining to the government's and United's investigation into the very disturbing message that I referenced in my September 10 letter to you, as I'm sure you can appreciate, I cannot disclose specific information

October 2, 2012
Page 2



at this time in order to preserve the integrity of the investigation and to ensure the safety of our employees.

Finally, I appreciate that you have accepted our offer to meet with us. During the first part of the meeting, we would like to discuss the two issues addressed above in the hopes that we can resolve these very important concerns. In the second part of the meeting, we would be happy to listen to your thoughts and ideas for improving United Airlines' relationships with its customers and employees. Martin Hand, United Airlines' Senior Vice President of Customer Experience, and I will attend the meeting for United Airlines. We are unable to meet with you on October 26, as proposed, but could meet with you in Montreal during the morning of October 31, the afternoon of November 12, or the morning of November 13. Please let me know if any of those dates would work for you.

Sincerely,

A handwritten signature in black ink, appearing to read "Mike H." followed by a stylized flourish.

Michael C. Henning

Court File No.: T-2084-12

FEDERAL COURT

BETWEEN:

UNITED AIRLINES, INC.

Plaintiff

– and –

DR. JEREMY COOPERSTOCK

Defendant

AMENDED STATEMENT OF DEFENCE

Dated: June 20, 2013

DR. JEREMY COOPERSTOCK

392 Grosvenor Street

Westmount, Québec H3Z 2M2

Tel: 438-808-6463

jcooperstock@gmail.com

Defendant

Court File No.: T-2084-12

FEDERAL COURT

BETWEEN:

UNITED AIRLINES, INC.

Plaintiff

– and –

DR. JEREMY COOPERSTOCK

Defendant

AMENDED STATEMENT OF DEFENCE

1. The Defendant admits the allegations contained in paragraphs 6 and 7 of the Statement of Claim.
2. The Defendant has no knowledge of the allegations contained in paragraphs 1-5 and 9-14 of the Statement of Claim.
3. The allegations contained in ~~paragraphs~~ paragraph 17 of the Statement of Claim are irrelevant. In any event, the removal of the link to www.inweddingdress.com was unrelated to the present action.
4. Pursuant to Rule 184(1) of the *Federal Court Rules*, all allegations of fact in the Statement of Claim that are not admitted are deemed to be denied.

THE DEFENDANT: DR. JEREMY COOPERSTOCK

5. The Defendant, Dr. Jeremy Cooperstock, is an individual living in the Province of Quebec, in the City of Westmount.
6. The Defendant is a full-time, tenured, associate professor of electrical and computer engineering at McGill University.
7. The Defendant does not own any business, and does not sell or offer to sell or distribute any goods.
8. Other than his full-time employment with McGill University, the only services that the Defendant offers are as a technical consultant.

PREDECESSOR OF THE UNTIED.COM WEBSITE: "POORSHOW"

9. In the summer of 1996, the Defendant travelled on a business and vacation trip with the Plaintiff ~~United Air Lines~~ ("United"), was mistreated by its agents during his travels, and was dissatisfied with United's refusal to address his complaint about his travel experience. The Defendant decided to share his negative experience with the public using his personal web page at the University of Toronto:
<http://www.dgp.toronto.edu/~jer/poorshow>
10. Over the course of the following months, the Defendant received numerous letters from other travellers about their poor experiences with United. In order to foster an open debate, the Defendant posted on his personal web page the comments he received from these travellers.
11. On September 6, 1996, the Defendant contacted the Plaintiff ~~United~~, brought to its attention the postings on his personal web page, and requested a personalized apology.

12. On or around March 17, 1997, the Plaintiff United contacted the President of the University of Toronto, suggesting that the University might be held liable for the contents of the Defendant's personal web page, and demanded that the University take steps to remove the content posted by the Defendant.
13. On or around March 24, 1997, the Defendant removed the content concerning the Plaintiff United from his personal web page at the University of Toronto, in order to spare the University legal hassles.

THE WEBSITE UNTIED.COM

14. On April 24, 1997, the Defendant registered the domain Untied.com, and re-launched the content concerning the Plaintiff United as an independent website ("Defendant's Website").
15. For over 15 years, since 1997, the Defendant has been maintaining the website Untied.com as both a forum for postings by passengers and employees of the Plaintiff United and as a satirical website, employing parody to expose poor service to passengers and mistreatment of employees by the Plaintiff United.
16. Visitors to Untied.com are offered the opportunity to post their account of their experiences with the Plaintiff United. Each posting is automatically assigned a unique ID number.
17. The Defendant denies the allegation at paragraph 16 of the Statement of Claim that he instructed any visitor to Untied.com to use the ID number automatically generated by Untied.com in correspondence with the Plaintiff United.

18. On the contrary, visitors who wish to submit a posting to Untied.com are presented with the following disclaimer:

Note that you are submitting your complaint to Untied.com, a website that provides a service for past and prospective passengers, alerting them to United Airlines' attitude towards its customers and employees. You may also wish to submit your complaint directly to any of the contacts at United Airlines. Before you do so, please see some tips for passengers considering legal action against the airline. And if you think United Airlines will take your complaint seriously, think again.

Furthermore, those who submit a posting to Untied.com are automatically sent an email message advising them of the appropriate avenues for contacting the Plaintiff United.

~~THE PLAINTIFFS ARE~~ PLAINTIFF IS THE MAKERS OF THEIR ITS OWN MISFORTUNE

19. On February 21, 1994, the Plaintiff United registered the domain name ual.com, and launched its website under that address.
20. Thus, in 1997, at the time of the registration of Untied.com, there was no possibility of confusion between Untied.com and the Plaintiff United's Plaintiff's website, which was operating under the address ual.com.
21. The Plaintiff United has been aware of the Defendant's Untied.com website since 1997.
22. On December 17, 1998, 20 months after the Defendant launched his Untied.com website, the Plaintiff United registered the domain united.com.
23. On November 7, 2000, that is, more than three years after the Defendant launched his Untied.com website, the Plaintiff United registered the

Canadian domain united.ca.

24. Therefore, the ~~Plaintiffs are~~ Plaintiff is the makers of their its own misfortune, because they it chose to use the domain names united.com and united.ca even though they it knew about the pre-existence of the Untied.com website.

COMPARISON: LOGOS DISPLAYED BY DEFENDANT VS. BY PLAINTIFFS PLAINTIFF

25. The predecessor of the Untied.com website, entitled "poorshow," which was posted on the Defendant's personal web page at the University of Toronto, displayed the following logo:



Defendant replaced this logo after United Air Lines expressed concern about the possibility that the logo may be misunderstood as a crashing airplane.

26. In part of 1998 and 1999, Untied.com displayed the following logo:

UNTIED AIRLINES

The most Unfriendly Skies



27. In 1999, the logo displayed on Untied.com was changed to the following:



This logo was displayed on Untied.com until March 2007.

28. Until 2005, the Plaintiff United displayed the following logo on its website:



29. In March 2007, the logo displayed on Untied.com was changed to the following:



30. Between 2006 and 2010, the Plaintiff United displayed the following logo on its website:



31. Since 2011, the Plaintiffs have Plaintiff has been displaying the following logo on their its website:



32. In August 2011, the Defendant redesigned the Untied.com website, and changed the logo displayed there to one that includes a frowning globe:



DEFENDANT'S RESPONSE TO THE ~~PLAINTIFFS'~~ PLAINTIFF'S CONCERNS

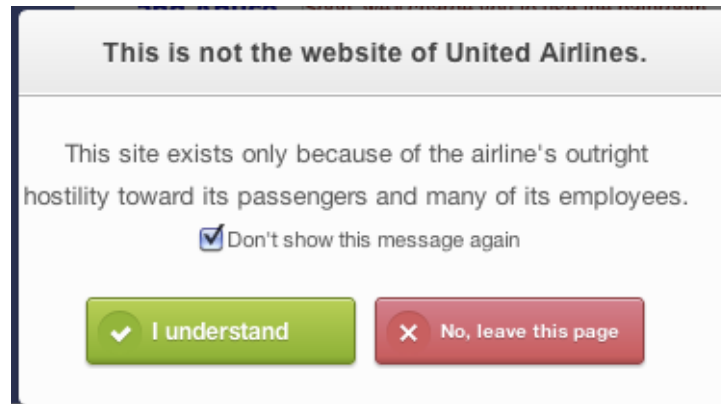
33. Between 1999 and July 16, 2012, the Plaintiffs Plaintiff expressed no concern nor objection regarding the logos displayed on the Defendant's website, which parodied the logos displayed by the Plaintiffs Plaintiff.

34. In early October 2012, the Defendant made the following changes on Untied.com in response to the ~~Plaintiffs'~~ Plaintiff's concerns as an additional, possibly unnecessary, safety measure to avoid any possible confusion:

- (a) The logo displayed on Untied.com was changed to the following (the color of the letters "TI" and the frown were changed to red):



- (b) A disclaimer that reads "(This is **not** the web page of United Airlines)" was added.
- (c) A pop-up, requiring first-time visitors to acknowledge that they understand that Untied.com is not the website of the Plaintiffs Plaintiff, was added:



35. The Defendant denies that a reasonable person could confuse his website, Untied.com, with the Plaintiffs' Plaintiff's website.

COPYRIGHT

36. The Defendant denies the Plaintiffs' Plaintiff's allegations that copyright subsists in the items listed in paragraphs 8-10 of the Statement of Claim.
37. Alternatively, the Defendant denies that the Plaintiffs' Plaintiff's own copyright in any of the items listed in paragraphs 8-10 of the Statement of Claim.
38. In the further alternative, the Defendant denies that the Defendant's Website reproduces a substantial part of any work in which the Plaintiffs own Plaintiff owns copyright.
39. With respect to paragraph 15 of the Statement of Claim, the graphics and text used on the Defendant's Website reproduce no substantial part of any original expression or work in which the ~~Plaintiffs own~~ Plaintiff owns copyright.
40. With respect to paragraph 9 of the Statement of Claim, the Plaintiffs Plaintiff can claim no copyright in banal and non-original design ele-

ments such as the use of “Sans-serif” font. The alleged use by the Defendant of particular design elements of the Plaintiffs’ Plaintiff’s website constitutes insubstantial copying that does not attract liability under section 3 of the *Copyright Act*, because the Defendant’s Website has markedly different content and functionality.

41. In the further alternative, any dealing on the Defendant’s Website with a substantial part of any work the copyright to which is owned by the Plaintiffs Plaintiff constitutes fair dealing for the purposes of parody, satire, criticism, and/or review, and as such constitutes no infringement pursuant to sections 29 and 29.1 of the *Copyright Act*.

DEFENDANT IS NOT ENGAGED IN COMMERCIAL ACTIVITY

42. The present matter relates to consumer criticism and consumer expression. It is far removed from the sort of commercial dispute for which a claim in trade-mark is appropriate.
43. According to paragraph 4 of the Statement of Claim, the Plaintiffs operate Plaintiff operates a large global airline, and ~~sell~~ sells air travel tickets on their its website.
44. In sharp contrast, the Defendant is an educator, who is engaged in no commercial activity or course of trade.
45. The Defendant is not a business, and in particular, not a business in the same area as the Plaintiffs Plaintiff.
46. The Defendant’s Website does not sell wares or services. The Defendant’s Website transfers no property in or possession of any wares. The Defendant’s non-commercial speech embodied in the Defendant’s

Website does not constitute a “service” within the meaning of the *Trade-marks Act*.

TRADE-MARK

47. The Defendant’s Website offers no “use” of trade-marks in association with the transfer of wares or advertisement or performance of services, as that term is defined and used in the *Trade-marks Act*. No trade-marks are associated with the transfer of property in or possession of any wares, nor associated with the advertisement or performance of any service.

48. The Defendant's Website makes no use of marks as a "trade-mark", that is, for the purpose of distinguishing or so as to distinguish wares or services manufactured, sold, leased, hired or performed by the Defendant – or anyone, for that matter – from those manufactured, sold, leased, hired or performed by others.
49. The Defendant uses no marks on the Defendant's Website that are owned by the Plaintiffs Plaintiff.
50. In the alternative, the Defendant's use of any marks on the Defendant's Website – which use is denied – does not constitute use of a mark in association with any ware or service itemized in any trade-mark registration registered in the Plaintiffs' Plaintiff's name.
51. In the further alternative, the Defendant's Website does not sell, distribute or advertise wares or services in association with a mark confusing with any trade-mark owned by the Plaintiffs Plaintiff. There is no likelihood of confusion between any trade-mark owned by the Plaintiff and anything on the Defendant's Website.
52. The theoretical possibility of such confusion – which is denied – is extinguished by the liberal use of disclaimers on the Defendant's Website, which specifically alert visitors to the Defendant's Website to the fact that it is not operated by the Plaintiffs Plaintiff.
53. The Defendant has made no use of a trade-mark registered by the Plaintiffs Plaintiff in a manner that is likely to have the effect of depreciating the value of the goodwill attaching thereto. To the extent that the Plaintiffs' Plaintiff's goodwill has depreciated, the Defendant claims that such goodwill attaches to the Plaintiffs' Plaintiff's business reputation, and not to the attractive force of its registered trade-marks.

54. According to the United States Department of Transportation, the ~~Plaintiffs~~ Plaintiff is the most complained about airline. Thus, it is unreasonable and ludicrous to allege that damage to goodwill has its source in the Defendant's actions.
55. Section 22 of the *Trade-marks Act* does not shield the ~~Plaintiffs~~ Plaintiff from the harmful ramifications of their its own treatment of passengers and/or their its own employees.

DELAY OF 15 YEARS

56. The ~~Plaintiffs~~ Plaintiff has been aware of the Defendant's Website, the domain Untied.com, and the Defendant's expressive activities therein for more than 15 years.
57. The ~~Plaintiffs~~ Plaintiff has not brought legal claims against the Defendant during that time, and the Defendant has relied upon the ~~Plaintiffs'~~ Plaintiff's conduct. The ~~Plaintiffs~~ Plaintiff is now barred from raising claims that ought to have been brought years ago.
58. The ~~Plaintiffs~~ Plaintiff now attempt attempts to revive their its claim in trade-mark by framing it in copyright. The ~~Plaintiffs~~ Plaintiff should not thereby be allowed to sidestep a delay of a decade and a half.

ABUSE OF PROCESS

59. This action is an abuse of process and should be dismissed, or in the alternative, the ~~Plaintiffs~~ Plaintiff should be denied equitable relief.
60. The ~~Plaintiffs~~ Plaintiff has brought this action in bad faith, without justification, and with an extraneous and improper purpose, namely, to use this litigation to coerce the Defendant to shut down the Untied.com

website.

61. The ~~Plaintiffs have~~ Plaintiff has not previously asserted their its rights with respect to copyright in Canada. Indeed, as Schedule “A” of the Statement of Claim demonstrates, ~~Plaintiffs~~ Plaintiff registered their its copyright only on October 29, 2012, that is, 21 days before instituting the present action.
62. The ~~Plaintiffs have~~ Plaintiff has no reasonable ground to believe that the Defendant’s Website wrongfully interferes with the ~~Plaintiffs’~~ Plaintiff’s business in Canada or elsewhere.
63. The ~~Plaintiffs’~~ Plaintiff’s predominant purpose in bringing this action is not to preserve or defend any alleged rights under the *Trade-marks Act* or the *Copyright Act*, or to obtain proper compensation for the violation of any such rights. Rather, their predominant purpose is to strong-arm the Defendant into giving up his expressive activities critical of the ~~Plaintiffs’~~ Plaintiff’s conduct.
64. The ~~Plaintiffs’~~ Plaintiff’s unlawful conduct described above is reprehensible, and deserves this Honourable Court’s condemnation.

GOOD FAITH AND REMEDIES

65. In the alternative, should the Honourable Court find any infringements of copyright or trade-mark, the Defendant has at all times acted in good faith and has taken steps to avoid infringement of ~~Plaintiffs’~~ Plaintiff’s intellectual property.
66. The Defendant was responsive to the ~~Plaintiffs’~~ Plaintiff’s concerns, and offered to meet with the ~~Plaintiffs’~~ Plaintiff’s representatives on a num-

ber of occasions since July 17, 2012. The Defendant was expecting that such a meeting would take place in December 2012; however, instead, ~~Plaintiffs~~ Plaintiff chose to institute the present action against the Defendant.

67. The Defendant denies that ~~Plaintiffs~~ Plaintiff suffered any damages as a result of the Defendant's actions. To the extent that the ~~Plaintiffs are~~ Plaintiff is ultimately found to be entitled to damages, and elect statutory damages under copyright law, such damages ought to be set at no more than \$100 as non-commercial statutory damages.
68. The Defendant submits that the ~~Plaintiffs'~~ Plaintiff's action against him be dismissed with costs.

June 20, 2013

DR. JEREMY COOPERSTOCK
392 Grosvenor Street
Westmount, Québec H3Z 2M2
Tel: 438-808-6463

jcooperstock@gmail.com

Defendant

TO: **GOWLING LAFLEUR HENDERSON LLP**
1 Place Ville Marie, 37th Floor
Montreal, Quebec H3B 3P4

Me Hélène D'Iorio

Tel: 514-392-9564
Fax: 514-878-1450

Me Lee A. Johnson

Tel: 514-392-9502

Fax: 514-876-9502

**Solicitor for the Plaintiff,
United Airlines, Inc.**

FEDERAL COURT

BETWEEN: UNITED AIR LINES AIRLINES, INC. and
~~CONTINENTAL AIRLINES, INC.~~

Plaintiffs
Plaintiff

AND

JEREMY COOPERSTOCK

Defendant

AMENDED REPLY

1. The ~~Plaintiffs deny~~ Plaintiff denies all of the allegations contained in the Defendant's Amended Statement of Defence, except as specifically admitted herein, and puts the Defendant to the strict proof thereof.
2. The ~~Plaintiffs~~ Plaintiff accepts the admission made in paragraph 1 of the Amended Statement of Defence.
3. With respect to the Defendant's allegations contained in paragraphs 19 to 24, 28, 30 and 31, the ~~Plaintiffs have~~ Plaintiff has used the trade-marks UNITED and UNITED

AIRLINES in Canada since at least as early as 1939 and these marks are the subject of registration numbers TMA204,456 and TMA367,179.

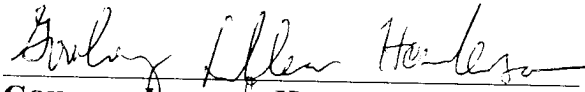
4. With respect to the Defendant's allegations relating to parody, including those contained in paragraphs 33 to 35 and 41, the ~~Plaintiffs deny~~ Plaintiff denies that the logos displayed on the Defendant's website constitute parodies of the ~~Plaintiffs'~~ Plaintiff's works as protected by copyright. The ~~Plaintiffs~~ Plaintiff further submits that any defence of fair dealing for the purposes of parody under Section 29 of the *Copyright Act* was only available as of November 7, 2012 and in any event, is not applicable to the case at hand. Furthermore, the ~~Plaintiffs deny~~ denies that the actions of the Defendant, before or after November 7, 2012, constitute fair dealing under the *Copyright Act*.
5. With respect to paragraph 34, the ~~Plaintiffs~~ Plaintiff alleges that the changes outlined in this paragraph were only made after the filing and service of the Statement of Claim, namely after November 19, 2012.
6. The ~~Plaintiffs~~ Plaintiff admits the allegation contained in paragraph 43.
7. With respect to paragraphs 42 and 44 to 55, the ~~Plaintiffs~~ Plaintiff ~~deny~~ denies that these are defences to trade-mark infringement. With respect to paragraph 52, the ~~Plaintiffs~~ Plaintiff further submits that even if disclaimers were made by the Defendant, which is not admitted by the ~~Plaintiffs~~ Plaintiff, there have been actual instances of confusion where visitors to the UNTIED.com website thought they were on the UNITED website.
8. With respect to paragraphs 56 to 58, the ~~Plaintiffs~~ Plaintiff ~~deny~~ denies that there has been a delay of fifteen (15) years in commencing the present proceeding. The proceeding commenced by the ~~Plaintiffs~~ Plaintiff relates to activities of the Defendant relating to the redesign of his website, which occurred by the Defendant's own admission in 2011, as contained in paragraph 32 of the Amended Statement of Defence.
9. With respect to paragraphs 59 to 64, the ~~Plaintiffs~~ Plaintiff expressly ~~deny~~ denies that the present action is an abuse of process and that the ~~Plaintiffs~~ Plaintiff should be denied equitable relief. As specifically stated in the Amended Statement of Claim, the ~~Plaintiffs~~ Plaintiff ~~are~~ is not seeking to prevent the Defendant from operating a website where

individuals can express their views about the ~~Plaintiffs~~ Plaintiff, but ~~are~~ is rather seeking to protect ~~their~~ its intellectual property rights and prevent consumer confusion over whether the ~~Plaintiffs~~ Plaintiff owns and/or sponsors the Defendant's UNTIED.com website.

10. With respect to paragraph 66, the Defendant refused to modify ~~its~~ his website prior to commencement of the present action.
11. The ~~Plaintiffs~~ Plaintiff further ~~deny~~ denies that the Defendant is entitled to any of the remedies or relief sought in the Amended Statement of Defence, including the remedies and relief sought in paragraphs 59, 67 and 68.

MONTREAL, February 6, 2013.

Amended June 27, 2013.



GOWLING LAFLEUR HENDERSON LLP

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H3B 3P4

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Solicitors for the ~~Plaintiffs~~ Plaintiff

TO: The Administrator
Federal Court of Canada
Trial Division

AND TO: Jeremy Coopertsock
392 Grosvenor Street
Westmount, Quebec
H3Z 2M2
Defendant

Refusals Chart, dated February 28, 2014

Q #	Pg.	Question	Objection	Defendant's position	Plaintiff's position
A. Plaintiff knowingly chose to use confusing domain name					
700 O-111	360	Why did United Airlines choose to move its operations from the perfectly acceptable short three letter UAL.com domain to United.com, which is longer and had the possibility of confusion with the Defendant's site?	Refused. Not relevant to any of the issues pleaded.	<p>Relevance:</p> <p>a) the Plaintiff is alleging customer confusion resulting from the Defendant's website (paras. 21, 23 of the Statement of Claim)</p> <p>b) it is common ground that the Defendant began to use the domain united.com, 20 months before the Plaintiff began using the domain, united.com</p> <p>c) the Defendant alleges that any alleged confusion by passengers arises from the Plaintiff's decision to use the domain name united.com (paras. 19-24 of the Defence)</p>	

Q #	Pg.	Question	Objection	Defendant's position	Plaintiff's position
B. Plaintiff is the maker of its own misfortune					
355	194	To indicate how many complaints were forwarded via (U-36 192)	Refused. This question is not relevant to any of the issues pleaded and in any event the Plaintiff cannot ascertain this information.	Relevance: a) the Plaintiff is alleging customer confusion relating to passengers who submit their complaints through the Defendant's website (para. 16 of Statement of Claim)	
356	195	Produce records of the complaints received by United Airlines via United.com.	Refused. Not relevant to any of the issues pleaded.	b) any damage the Plaintiff is allegedly suffering (para. 31 of Statement of Claim) is due to its own fault; this can defeat the Plaintiff's claim that there is a causality between Defendant's action and the damages allegedly suffered by Plaintiff	
357	197	To provide the date when Ms. Harvill's email address ceased accepting forwarded complaints from United.com.	Refused. Not relevant to any of the issues pleaded.		
O-58					
363	199	To verify whether during and after September 2000 United received forwarded complaints sent to customer@united.com from United.com, and until when these were received at customer@united.com.	Refused. This information is impossible to ascertain, and this question is not relevant to any of the issues pleaded in any event.	The Plaintiff can easily answer questions 355 and 363 by consulting its own complaints database.	
U-39					
367	202	How many passenger complaints does United receive	Refused. Not relevant to any of the issues	Relevance:	

Q #	Pg.	Question	Objection	Defendant's position	Plaintiff's position
O-62		every year?	pleaded.	a) Plaintiff alleges that it is "rated the world's most admired airline" para. 4 of Statement of Claim)	
368	203	How many complaints has United received since the merger with Continental?	Refused. Not relevant to any of the issues pleaded.	b) the Plaintiff alleges that Defendant's activities have had the effect of depreciating the value of the goodwill attaching to the Plaintiff's trade-marks (para. 29 of Statement of Claim)	
435, 437	229-230	So would you say that passengers were happy with the results of the merger?/ So would you say that passengers were happy with the results of the merger The next question: would you say that the merger caused damage to the goodwill of United?	Refused. Not relevant to any of the issues pleaded and question about goodwill requires a legal interpretation and/or expert opinion.	c) the Defendant alleges that the Plaintiff is the most complained about airline (para. 54 of the Defence)	
O-70 – O-71				d) this speaks to the causality of the Defendant's conduct and the damages allegedly suffered by the Plaintiff	
443	233	Would you agree with me that the loss of goodwill was a result of the bad treatment, and had nothing to do with Dr. Cooperstock's alleged actions?	Refused. Requires a legal interpretation and/or expert opinion.	e) the Defendant alleges that it is the Plaintiff's conduct itself, and not the Defendant's activities complained about, that have the effect of depreciating the value of the goodwill attaching to the Plaintiff's trade-mark (para. 54 of the Defence)	
O-73	235	Are the events described in the video true? [exhibit 29]	Refused. Not relevant to any of the issues pleaded.		
455	241	Are the events described in the second video true? [exhibit 29]	Refused. Not relevant to any of the issues pleaded.		
O-79					

Q #	Pg.	Question	Objection	Defendant's position	Plaintiff's position
C. Damages allegedly suffered by United -- paragraph 31 of the Statement of Claim					
449	235	Have you calculated the amount of revenue that United allegedly lost as a result of this video? [exhibit 29]	Refused. Not relevant to any of the issues pleaded.	Relevance: a) although the Plaintiff is no longer claiming monetary compensation as a remedy, it is alleging that the Defendant's activities cause the Plaintiff to suffer considerable damages (para. 31 of Statement of Claim);	
456	242	Have you calculated the amount of revenue that United allegedly lost as a result of the second video? [exhibit 29]	Refused. Not relevant to any of the issues pleaded.	b) thus, whether and to what extent the Plaintiff has suffered damages caused by the Defendant, is relevant; and c) whether Plaintiff has suffered damages caused by other individuals against whom the Plaintiff has taken no legal action, relates to abuse of process (paras. 59-63 of the Defence)	
463	246	Provide specific answers, so specific type of damages, specific dollar amounts, specific prejudice that United suffered or claims to suffer as a result of the infringement which it alleges that United.com/ Jeremy Cooperstock is responsible for?	Refused United hereby confirms that it will not be claiming monetary compensation in the present proceeding for the infringement of its rights and as such, the questions are not relevant.		
D. History of Defendant's website as known to the Plaintiff					
114	82	As United Airlines, do you see any trade mark or copyright objections to this webpage as it	Refused. The question calls for a legal interpretation	The questions were not related to mental attitudes, but rather, seeking a factual response as to whether the	
O-15					

Q #	Pg.	Question	Objection	Defendant's position	Plaintiff's position
		now stands?	and requires expert opinion.	Plaintiff considered the Defendant's website to be a source of potential customer confusion or any other harm, earlier in its history.	
133 O-17	91	Does United have any concerns about trade mark or copyright at this stage/how did United "feel" in this regard, as of the year 2000 (with reference to Exhibit 9)?	<u>Refused.</u> United's "concerns" or "feelings" as of 2000 are a) not relevant to any of the issues pleaded; b) the question is vague because the meaning of "concerns" or "feelings" cannot be ascertained; c) witness cannot be asked to express his position in terms of mental attitudes and d) any discussions about infringement of the Plaintiff's rights are subject to solicitor-client privilege.	The Plaintiff's representative readily understood similar question(s) and had no difficulty ascertaining the meaning of "what United felt" and "what was United's concern" in answering undertakings #2 and #3. <u>Relevance:</u> a) timeliness of the action, in not bringing legal claims for more than 15 years (para. 25-33 and 56-57 of the Defence); b) bad faith (para. 60 of the Defence); c) allegations of infringement of trade-mark and copyright (para. 7-14 of Plaintiff's amended Statement of Claim).	
134 O-18	92	Was United concerned with the use of the word "United" or the font as of the year 2000? (with reference to Exhibit 9)	<u>Refused.</u> United's "concerns" as of 2000 are a) not relevant to any of the issues pleaded; b) the question is vague because the meaning of "concerns" cannot	Plaintiff has provided no evidence to support solicitor-client privilege on these questions.	

Q #	Pg.	Question	Objection	Defendant's position	Plaintiff's position
			be ascertained; c) witness cannot be asked to express his position in terms of mental attitudes and d) any discussions about infringement of the Plaintiff's rights are subject to solicitor-client privilege.		
135 O-19	92	Was United worried about the colour scheme employed in the logo or the webpage layout as of the year 2000?	Refused. Whether United was "worried" as of 2000 is a) not relevant to any of the issues pleaded; b) the question is vague because the meaning of "concerns" cannot be ascertained; c) witness cannot be asked to express his position in terms of mental attitudes and d) any discussions about infringement of the Plaintiff's rights are subject to solicitor-client privilege.		
136	92	Was United worried that this might be infringing on United's	Refused. Whether United was "worried"		

Q #	Pg.	Question	Objection	Defendant's position	Plaintiff's position
O-20		trademarks or copyright as of the year 2000?	as of 2000 is a) not relevant to any of the issues pleaded; b) the question is vague because the meaning of "worried" cannot be ascertained; c) witness cannot be asked to express his position in terms of mental attitudes; d) requires a legal interpretation and e) any discussions about infringement of the Plaintiff's rights are subject to solicitor-client privilege.		
146 U-15	98	To verify if United had any concerns about trade-marks or copyright at the date of Exhibits 11 and 12 (August 25, 2005 and March 6, 2007).	Refused. United's "concerns" as of 2005-2007 are a) not relevant to any of the issues pleaded; b) the question is vague because the meaning of "concerns" cannot be ascertained; c) witness cannot be asked to express his position in terms of mental attitudes and d)		

Q #	Pg.	Question	Objection	Defendant's position	Plaintiff's position
147	98	Was United concerned about the use of the word "United" or was United concerned about the font at the date of Exhibits 11 and 12 (August 25, 2005 and March 6, 2007).	Refused. United's "concerns" as of 2005-2007 are a) not relevant to any of the issues pleaded; b) the question is vague because the meaning of "concerned" cannot be ascertained; c) witness cannot be asked to express his position in terms of mental attitudes and d) any discussions about infringement of the Plaintiff's rights are subject to solicitor-client privilege.		
148	99	Was United worried about the colour scheme employed in the logo or the webpage layout at the date of Exhibits 11 and 12 (August 25, 2005 and March 6, 2007)?	Refused. Whether United was "worried" as of 2005-2007 are a) not relevant to any of the issues pleaded; b) the question is vague because the meaning		

Q #	Pg.	Question	Objection	Defendant's position	Plaintiff's position
			of "worried" cannot be ascertained; c) witness cannot be asked to express his position in terms of mental attitudes and d) any discussions about infringement of the Plaintiff's rights are subject to solicitor-client privilege.		
149 O-24	99	Was United worried that this might be infringing on United's trade-marks or copyrights?	Refused. Whether United was "worried" as of 2005-2007 is a) not relevant to any of the issues pleaded; b) the question is vague because the meaning of "worried" cannot be ascertained; c) witness cannot be asked to express his position in terms of mental attitudes; d) calls for a legal interpretation and e) any discussions about infringement of the Plaintiff's rights are subject to solicitor-		

Q #	Pg.	Question	Objection	Defendant's position	Plaintiff's position
			client privilege.		
169 U-18	108	To verify if United had concerns about trade mark or copyright issues regarding the United.com webpage on September 3, 2011 (Exhibit 15).	Refused. United's "concerns" as of 2011 are not relevant to any of the issues pleaded, the question is vague because the meaning of "concerns" cannot be ascertained and witness cannot be asked to express his position in terms of mental attitudes.		
170 O-30	108	Was United concerned about the word "United" or the font (as depicted on the United.com webpage on September 3, 2011 (Exhibit 15))?	Refused. a) United's "concerns" as of 2011 are not relevant to any of the issues pleaded, b) the question is vague because the meaning of "concerned" cannot be ascertained, c) witness cannot be asked to express his position in terms of mental attitudes and d) any discussions about infringement of the Plaintiff's rights are subject to solicitor-		

Q #	Pg.	Question	Objection	Defendant's position	Plaintiff's position
			client privilege.		
171 O-31	109	Was United worried about the colour scheme employed in the logo, or the webpage layout (as depicted on the United.com webpage on September 3, 2011 (Exhibit 15))?	Refused. Whether United was “worried” as of 2011 is not relevant to any of the issues pleaded, the question is vague because the meaning of “worried” cannot be ascertained, the witness cannot be asked to express his position in terms of mental attitudes and any discussions about infringement of the Plaintiff’s rights are subject to solicitor-client privilege.		
172 O-32	109	Was United worried that the United.com webpage on September 3, 2011 might be infringing on United’s trade-marks or copyright?	Refused. Whether United was “worried” as of 2011 is a) not relevant to any of the issues pleaded; b) the question is vague because the meaning of “worried” cannot be ascertained; c) witness cannot be asked to express his		

Q #	Pg.	Question	Objection	Defendant's position	Plaintiff's position
			position in terms of mental attitudes; d) calls for a legal opinion and e) any discussions about infringement of the Plaintiff's rights are subject to solicitor-client privilege.		
E. Failure to take legal action for 15 years					
137 O-21	94	Did United contemplate legal action?	Refused. This information is subject to solicitor-client privilege.	Relevance: a) the Plaintiff alleges infringement of trade-mark and copyright (paras. 7-14 of amended Statement of Claim)	
		Why did United Airlines do nothing about it?	Refused. This information is subject to solicitor-client privilege.	b) yet the Plaintiff took no action regarding Defendant's website for 15 years (paras. 25-33 and 56-57 of Defence);	
		Why didn't United Airlines threaten legal action?	Refused. This information is subject to solicitor-client privilege.	c) the delay may be grounds for denying equitable relief.	
153 O-25	101	Did United contemplate legal action?	Refused. This information is subject to solicitor-client	The Plaintiff has provided no evidence to support solicitor-client privilege on these questions.	

Q #	Pg.	Question	Objection	Defendant's position	Plaintiff's position
			privilege.		
157	103	Why did United Airlines do nothing about it (Exhibit 12)?	Refused. This information is subject to solicitor-client privilege.		
O-28					
159	104	And why didn't United Airlines threaten legal action about it (Exhibit 12)?	Refused. This information is subject to solicitor-client privilege.		
O-29					
175	111	Did United contemplate legal action?	Refused. This information is subject to solicitor-client privilege.		
O-33					
179	112	(Assuming that it did not) Why did United Airlines not do nothing about (the website as it appeared in Exhibit 15), and why didn't United Airlines threaten legal action?	Refused. This information is subject to solicitor-client privilege.		
O-35					
F. Defendant has taken steps to avoid confusion					
203	119	Just to verify, would it be fair to say that you find that this is confusingly similar to the words "United" in blue?	Refused. The question requires a legal interpretation.	This question does not require a legal interpretation, but is rather seeking a fact.	
O-36					

Q #	Pg.	Question	Objection	Defendant's position	Plaintiff's position
				<p>Relevance:</p> <p>a) the Plaintiff is pleading “customers have evidenced confusion” (para. 16 of Statement of Claim)</p> <p>b) the Defendant alleges that he has used different font colour, a pop-up dialog, and liberal disclaimers throughout his website to extinguish the theoretical possibility of confusion (para. 52 of Defence)</p> <p>c) answers to this question can show that the Defendant has taken sufficient steps to avoid creating confusion</p>	
G. Plaintiff brought action in bad faith					
211 O-38	123	To produce the minutes and internal correspondence of the meetings of United Airlines management regarding the discussions of United.com about the 23rd of August 2012 version of the website.	Refused. This information is subject to solicitor-client privilege and is not relevant to the issues pleaded.	<p>Relevance:</p> <p>a) the Defendant raises as a defence the Plaintiff's abuse of process (paras.59-60, 63-64, and 66 of the Defence)</p> <p>b) information provided in answer</p>	

Q #	Pg.	Question	Objection	Defendant's position	Plaintiff's position
212 O-39	124	To produce minutes and internal correspondence at United Airlines about the United.com website.	Refused. This information is subject to solicitor-client privilege and is not relevant to the issues pleaded.	to these questions can demonstrate that the Plaintiff was never concerned about alleged damages but rather, the real purpose of its action was to shut down the Defendant's website, contrary to what the Plaintiff states in the Statement of Claim	
550-552 O-101-O-103	294-295	What sort of legal action has United Airlines taken against Amplicate?/Has it threatened Amplicate with such legal action? Why not?	Refused. Not relevant to any of the issues pleaded.	Relevance: a) the Defendant alleges that the Plaintiff has singled out the Defendant, using litigation to coerce the Defendant to shut down his website (para. 60 of the Defence) b) the Defendant alleges that the Plaintiff's real purpose is to shut down the Defendant's website, rather than to preserve or defend any alleged rights under the Trade-marks Act or Copyright Act (para. 63 of the Defence).	
556-557 O-104-O-106	296-297	What sort of threats of legal action has United Airlines taken against Goldring Travel?/Has it taken any such legal action? Why not?	Refused. Not relevant to any of the issues pleaded.		
562-564 O-107-O-109	299-300	What sort of threats of legal action has United Airlines taken against change.org?/Has it taken any such legal action? Why not?	Refused. Not relevant to any of the issues pleaded.		
565 O-110	300	Indicate whether "anything has been done" about the webpages in Exhibits 32, 33, and 34.	Refused. Not relevant to any of the issues pleaded.	The Plaintiff has provided no evidence to support solicitor-client privilege on these questions.	

Q #	Pg.	Question	Objection	Defendant's position	Plaintiff's position
H. Right to know identity and nature of testimony of non-expert witnesses					
493-495	263-264	What witnesses does United intend to call/what non-expert witnesses does United intend to call/what topics will they testify on?	Refused. This is an improper question under the Rules and is in the nature of a fishing expedition.	a) the Plaintiff is required to provide this information under Rule 240 (b) b) the requested information is specific to the identity and topics of testimony for "non-expert" witnesses	
O-91 – O-93					
I. Mootness					
545-546	293	Does United have plans to modify the layout of its web pages at any point in the future?/ Does United have plans to modify its logo at any point in the future?	Refused. Not relevant to any of the issues pleaded.	Relevance: By the time the matter goes to trial, it may become moot as United changes its website.	
O-99 – O-100					

Court File No.: T-2084-12

FEDERAL COURT

BETWEEN:

UNITED AIRLINES, INC.

Plaintiff

– and –

DR. JEREMY COOPERSTOCK

Defendant

AFFIDAVIT OF DR. JEREMY R. COOPERSTOCK

I, **DR. JEREMY R. COOPERSTOCK**, of the City of Westmount, in the Province of Quebec, AFFIRM THAT:

1. I am the Defendant in this proceeding, and as such I have personal knowledge of the matters deposed to.
2. On September 17, 2013, I sent a letter to Plaintiff's counsel regarding discovery, a copy of which is attached and marked as Exhibit "A".

3. On October 2, 2013, examination on discovery of Plaintiff's representative, Mr. Scott Albert Wilson, was held. Excerpts of the transcript of examination are attached and marked as Exhibit "B".

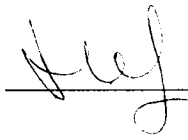
4. During the October 2, 2013 examination on discovery of Plaintiff's representative, excerpts of the Air Travel Consumer Report, issued in August 2011 and August 2012, were used as exhibits, copies of which are attached and marked as Exhibits "C" and "D".

5. During the October 2, 2013 examination on discovery of Plaintiff's representative, video exhibits "United breaks guitars", dated July 6, 2009, and "United Airlines Employees Abuse Disabled Veteran and His Service Dog", dated July 20, 2012 were viewed. A CD containing a copy of these videos is attached and marked as Exhibit "E".


6. On November 25, 2013, Plaintiff provided its responses to undertakings from the examination on discovery of its representative, an excerpt of which is attached and marked as Exhibit "F".

7. On April 28, 2014, Plaintiff's witness, Mr. Jeff Wittig, testified before the Quebec Superior Court in a parallel proceeding brought against me by the Plaintiff and its senior employees. An excerpt of Mr. Wittig's testimony is attached and marked as Exhibit "G".

AFFIRMED before me at the City of
Montréal, in the Province of Québec
on May 21, 2014.



MARIE-EVE LAROCHE
AGENT DU GREFFE
REGISTRY OFFICER


Dr. Jeremy R. Cooperstock

392 Grosvenor Avenue
Westmount, Québec H3Z 2M2
Tel: 438-808-6463
jcooperstock@gmail.com

This is **Exhibit "A"** to the Affidavit of Dr. Jeremy R. Cooperstock
affirmed before me on March 4, 2014

in Montreal

E. Thomassian

Signature

EVELYNE THOMASSIAN
AGENT DU GREFFE
REGISTRY OFFICER

Dr. Jeremy Cooperstock
392 Grosvenor Street
Westmount, QC H3Z 2M2

jcooperstock@gmail.com

September 17, 2013

VIA EMAIL

Me Hélène D'Iorio
Gowling Lafleur Henderson LLP
1 Place Ville Marie, 37th Floor
Montréal, QC HJ8 JP4

Dear Me D'Iorio :

**Re: United Airlines, Inc. v. Jeremy Cooperstock
Federal Court File No.: T-2084-12
Examinations on Discovery of United Airlines**

In advance of my examining of the representative of United Airlines, scheduled for October 2, 2013, I respectfully request that you ensure that the representative has familiarized himself with all relevant issues, including:

- interactions between myself and United Airlines since 1996;
- all aspects of United Airlines' websites, domains, designs, and logos;
- all aspects of my websites, domains, designs, and logos;
- volume and handling of passenger and employee complaints against United Airlines.

I would like to thank you in advance for your cooperation.

Sincerely yours,



Dr. Jeremy Cooperstock

This is **Exhibit "B"** to the Affidavit of Dr. Jeremy R. Cooperstock
affirmed before me on March 4, 2014

In Montreal

E. Thomassian

Signature

EVELYNE THOMASSIAN
AGENT DU GREFFE
REGISTRY OFFICER

IN THE FEDERAL COURT OF CANADA

FILE NO: T-2084-12

BETWEEN :

UNITED AIRLINES, INC.,

Plaintiff,

- and -

JEREMY COOPERSTOCK,

Defendant.

Examination on Discovery of SCOTT ALBERT WILSON,
taken on OCTOBER 2, 2013 in Montreal, Quebec, Canada.

APPEARANCES :

Me LOUIS BELIVEAU (via Skype) For the Defendant

Me HÉLÈNE D'IORIO/Me LEE A. JOHNSON For the Plaintiff

ALSO PRESENT:

Mr. MIKE HENNING (in-house counsel for United Airlines)

Elizabeth Robinson, Official Court Reporter

1 Me HÉLÈNE D'IORIO:

2 You will have to define what you mean by
3 'objectionable'.
4

5 BY Me LOUIS BELIVEAU:

6 Well, by 'objectionable' I would mean anything
7 that United would find legally objectionable,
8 such as --

9 A. I am not a legal expert, so I couldn't
10 speak to the legal objection that might have been
11 raised at the time.

12 113. Q. Okay, was a legal objection raised at the
13 time?

14 A. I am not aware of it as I wasn't employed
15 at that time.

16 114. Q. As United Airlines, do you see any trade
17 mark or copyright objections to this webpage as it
18 now stands?

19 Me HÉLÈNE D'IORIO:

20 No, I instruct the witness to answer that
21 question; it is strictly a legal question, Mr.
22 Beliveau.
23

24 EXHIBIT NO. 8: Untied Airlines webpage, 4
25 pages.

1 OBJECTION NO. 15: As United Airlines, do you
2 see any trade mark or copyright objections to
3 this webpage as it now stands? [re Exhibit 8]
4

5 BY Me LOUIS BELIVEAU:

6 115. Q. Okay. Did United's lawyers claim on March
7 17, 1997, I believe this was a letter to the
8 University of Toronto, that United held a trade
9 mark for the phrase 'friendly skies'; this is
10 Exhibit A-4. Dr. Cooperstock can point to where it
11 is if you wish.

12 Mr. JEREMY COOPERSTOCK:

13 The first page.

14 THE WITNESS:

15 I could read that paragraph for you, if it
16 would help.

17 Me LOUIS BELIVEAU:

18 Sure, Dr. Cooperstock, if you could point it
19 out to --

20 Mr. JEREMY COOPERSTOCK:

21 I think he has got it.

22 THE WITNESS:

23 I do see it.
24
25

1 BY Me LOUIS BELIVEAU:

2 116. Q. Okay.

3 A. The letter states, 'Mr. Cooperstock
4 prominently uses, on the initial screen of the
5 website and on the initial screen for every subpage
6 of the website, marks identical or virtually
7 identical to United Airlines' U logo and 'friendly
8 skies' trade marks.'

9 117. Q. Do you agree that the phrase 'the most
10 unfriendly skies' qualifies as disparaging United's
11 alleged 'friendly skies' trade marks?

12 Me HÉLÈNE D'IORIO:

13 I instruct the witness not to answer that
14 question; that is a legal question.

15
16 OBJECTION NO. 16: Do you agree that the
17 phrase 'the most unfriendly skies' qualifies
18 as disparaging United's alleged 'friendly
19 skies' trade marks?

20
21 BY Me LOUIS BELIVEAU:

22 118. Q. Okay. Why did United apologize to Dr.
23 Cooperstock in Exhibit 7; this is the Kiker letter,
24 rather than threatening him with legal action?

25 A. I couldn't speak to why there was no

1 threat of legal action, but I know that United
2 Airlines always tries to reach out to its customers
3 when they feel as though there was a disservice or
4 dissatisfaction, and some customers engage with
5 United Airlines in different ways, and it would
6 appear as though that we were continuing our
7 engagement, or attempting to engage with Mr.
8 Cooperstock.

9 119. Q. But you are not able to answer the
10 specific question of why United apologized rather
11 than threatening him with legal action?

12 Me HÉLÈNE D'IORIO:

13 We can't hear you anymore.

14 THE WITNESS:

15 The train is going by again.

16 Me HÉLÈNE D'IORIO:

17 Yes.

18 Me LOUIS BELIVEAU:

19 I actually think it is actually on your side;
20 I heard that in my headphones as well.

21
22 Off-the-record discussion.

23
24 Me HÉLÈNE D'IORIO:

25 120. Q. Could you undertake, Mr. Wilson, to find

1 out why United apologized to Dr. Cooperstock,
2 rather than threatening him with legal action?

3 Me HÉLÈNE D'IORIO:

4 Well, we will take that under advisement; I am
5 not even sure I understand the question, so
6 United apologized, and now what you are
7 suggesting instead they should have threatened
8 him, is that --

9 Me LOUIS BELIVEAU:

10 I am asking why they apologized at the time,
11 rather than threatening him with legal action,
12 that is all.

13 Me HÉLÈNE D'IORIO:

14 Well, we will take that under advisement.

15
16 UNDERTAKING NO. 14: To find out why United
17 apologized to Dr. Cooperstock rather than
18 threatening him with legal action. (in Exhibit
19 7) [Under Advisement]

20
21 BY Me LOUIS BELIVEAU:

22 121. Q. Okay, okay. Moving on, we have got the
23 next exhibit here. Dr. Cooperstock if you could
24 please produce it for Mr. Wilson; it is a webpage.
25 This is the state of --

1 Mr. JEREMY COOPERSTOCK:

2 United.com.

3
4 EXHIBIT NO. 9: United.com webpage from April
5 7, 2000.

6
7 BY Me LOUIS BELIVEAU:

8 122. Q. Yes, so that is in front of you, just a
9 statement of the home page of United.com, I believe
10 from the 7th of April 2000, and we have got -- do
11 you have the page in front of you, Mr. Wilson?

12 A. I do.

13 Me LOUIS BELIVEAU:

14 Dr. Cooperstock, perhaps we could have the
15 equivalent, the second exhibit from Untied, as
16 well?

17 Mr. JEREMY COOPERSTOCK:

18 Yes, provided.

19
20 EXHIBIT NO. 10: Untied.com webpage dated
21 October 12, 1999.

22
23 BY Me LOUIS BELIVEAU:

24 123. Q. So you have both pages?

1 Mr. JEREMY COOPERSTOCK:

2 That is from October 12, 1999.

3
4 BY Me LOUIS BELIVEAU:

5 Yes, these are fairly close together dates,
6 yes.

7 124. Q. So the question is, Mr. Wilson, and we
8 would like both of these to be entered in as
9 exhibits of course, but the question is do you find
10 anything objectionable about this exhibit?

11 Me HÉLÈNE D'IORIO:

12 Mr. Beliveau you will have to specify again
13 what you mean by 'objectionable'.

14
15 BY Me LOUIS BELIVEAU:

16 125. Q. Well, the Untied webpage as of the 12th of
17 October 1999, do you find anything objectionable
18 about it?

19 A. You gave me the date; I am not sure I
20 understood what you meant by 'objectionable'.

21 126. Q. Well, as a representative of United
22 Airlines do you have anything that you find you
23 believe objectionable to point to in the Untied.com
24 as of the 12th of October 1999?

25 A. So I apologize, it sounds like that time

1 you told me my employment status, but I didn't hear
2 what you meant by 'objectionable'.

3 127. Q. By 'objectionable' I mean anything that
4 you think would be worthy of legal action.

5 A. Well, I can't speak to legal action; I am
6 not a legal expert.

7 128. Q. Okay, I imagine we have got a series of
8 questions which are probably all going to be
9 objected to, but we will ask them. Moving to the
10 next exhibit, I think that is probably --

11 Me HÉLÈNE D'IORIO:

12 It is the same thing.

13 Mr. JEREMY COOPERSTOCK:

14 Yes. Maitre Beliveau, are you sure you can't
15 like move your microphone away from the
16 computer further?

17 Me LOUIS BELIVEAU:

18 No, I can try to move myself away, I don't
19 know if it helps, but it unfortunately doesn't
20 seem to. Perhaps you want to run through
21 these questions, Dr. Cooperstock, and then
22 hopefully the sound will be better afterwards.

23 Me HÉLÈNE D'IORIO:

24 No, no, what do you mean 'run through the
25 questions', excuse me?

1 Me LOUIS BELIVEAU:

2 Well, we have a list of questions, so perhaps
3 if Dr. Cooperstock were to read the questions
4 it would be easier for everyone to hear.

5 Me HÉLÈNE D'IORIO:

6 No, you go ahead and you ask the questions,
7 Mr. Beliveau. I mean, it would seem that the
8 problem appears to be the -- I would view it
9 as the fan on your computer, I don't know what
10 you think. I am not a real technical expert,
11 but it sounds like --

12 Me LOUIS BELIVEAU:

13 Well I am afraid it isn't because it is a very
14 tiny laptop, and I am quite far away from it.

15 Me HÉLÈNE D'IORIO:

16 Well, no, we all hear it, though. We are off
17 the record --

18
19 Off-the-record discussion.

20
21 BY Me LOUIS BELIVEAU:

22 129. Q. Looking at the two productions, could you
23 tell me, Mr. Wilson, if you find the logos to be
24 similar?

25 A. You are asking if I find the logos at the

1 top of each respective site to be similar?

2 130. Q. Yes.

3 A. Yes, I do.

4 131. Q. Does United have any concerns about trade
5 mark or copyright at this stage? So, this would be
6 in the year 2000?

7 A. Now, my opinion, I would imagine that
8 United, like any corporation, would be very
9 concerned about misuse of its trade marks and
10 copyrights.

11 132. Q. Okay, is that what you imagine, or is that
12 United speaking?

13 A. I can only tell you what I imagine.

14 133. Q. Could you undertake to find out what
15 United felt? I understand it is a little bit
16 difficult, but this is a Corporation, it is a legal
17 person, it is legally treated as a person, so we
18 need to find out how it felt at the time.

19 Me HÉLÈNE D'IORIO:

20 Okay, excuse me, but when you say 'how it
21 felt', is the question were they concerned
22 with trade mark or copyright infringement at
23 that time, in that 1999 --

24 Me LOUIS BELIVEAU:

25 Yes, that is exactly the question. I mean,

1 what I am saying is I don't want how Mr.
2 Wilson views it now, I want to know how United
3 viewed it then. So, was United then concerned
4 about trade marks or copyright violations?

5 Me HÉLÈNE D'IORIO:

6 No, we will take that under advisement.

7
8 OBJECTION NO. 17: Could you undertake to find
9 out what United felt? I understand it is a
10 little bit difficult, but this is a
11 Corporation, it is a legal person, it is
12 legally treated as a person, so we need to
13 find out how it felt at the time. (was United
14 Airlines concerned with trade mark or
15 copyright infringement in that 1999). [Under
16 Advisement]

17
18 BY Me LOUIS BELIVEAU:

19 134. Q. Okay. Was United concerned with the use
20 of the word 'Untied' or the font?

21 Me HÉLÈNE D'IORIO:

22 We will take that under advisement.

23
24 OBJECTION NO. 18: Was United concerned with
25 the use of the word 'Untied' or the font?

1 [Under Advisement]

2
3 BY Me LOUIS BELIVEAU:

4 135. Q. Was United worried about the colour scheme
5 employed in the logo or the webpage layout?

6 Me HÉLÈNE D'IORIO:

7 Yes, we will take that under advisement.
8

9 OBJECTION NO. 19: Was United worried about
10 the colour scheme employed in the logo or the
11 webpage layout? [Under Advisement]
12

13 BY Me LOUIS BELIVEAU:

14 136. Q. Was United worried that this might be
15 infringing on United's trade marks or copyright?

16 Me HÉLÈNE D'IORIO:

17 We will take that under advisement.
18

19 OBJECTION NO. 20: Was United worried that
20 this might be infringing on United's trade
21 marks or copyright? [Under Advisement]
22

23 BY Me LOUIS BELIVEAU:

24 137. Q. I will have to ask some questions, Mr.
25 Wilson, which I know you don't know the answer to,

1 because -- just to get them on the record so that
2 you can answer them as you answer the other ones,
3 so I don't actually expect you to be able to answer
4 these now. Which would be: Did United Airlines
5 protest or communicate its concerns to Dr.
6 Cooperstock in any way? The second one is: Did
7 United contemplate legal action? The third one:
8 Did United instruct counsel to issue a take-down
9 notice? Did United Airlines threaten to sue? Why
10 did United Airlines do nothing about it? Why
11 didn't United Airlines threaten legal action?
12 These are questions which you will be able to
13 answer after you have informed yourself of the
14 previous answers about these two productions.

15 Me HÉLÈNE D'IORIO:

16 We will take those under advisement, but I can
17 tell you without sort of -- I will deal with
18 it afterwards when we answer the questions;
19 certainly some of them are, you are asking for
20 privileged information.

21 Me LOUIS BELIVEAU:

22 Okay, and we will likely end up having a
23 follow-up session if we can't -- well, we will
24 deal with it when we get there.

1 Me HÉLÈNE D'IORIO:

2 Yes.

3
4 OBJECTION NO. 21: Did United Airlines protest
5 or communicate its concerns to Dr. Cooperstock
6 in any way?

7 Did United contemplate legal action?

8 Did United instruct counsel to issue a take-
9 down notice?

10 Did United Airlines threaten to sue?

11 Why did United Airlines do nothing about it?

12 Why didn't United Airlines threaten legal
13 action? [Under Advisement]

14
15 BY Me LOUIS BELIVEAU:

16 138. Q. Looking at the next set of exhibits; Dr.
17 Cooperstock, if you could please hand those out,
18 and put them into evidence. It is the August 25,
19 2005 United page, and March 6, 2007 Untied page.

20
21 EXHIBIT NO. 11: United page dated August 25,
22 2005.

23
24 EXHIBIT NO. 12: Untied page dated March 6,
25 2007.

1 Me HÉLÈNE D'IORIO:

2 And where do we see the date, Mr. Cooperstock,
3 just so we specify the date.

4 Mr. JEREMY COOPERSTOCK:

5 Yes, there is no date on that; that is taken
6 from production 3810, and the next one is
7 production 5955.

8 Me HÉLÈNE D'IORIO:

9 So the first one was, sorry, 3?

10 Mr. JEREMY COOPERSTOCK:

11 3810.

12 Me HÉLÈNE D'IORIO:

13 3810, yes.

14 Mr. JEREMY COOPERSTOCK:

15 I am not sure --

16 Me HÉLÈNE D'IORIO:

17 Yes, yes, and the other one?

18 Mr. JEREMY COOPERSTOCK:

19 Is 5955. I don't know why archiveorg didn't
20 produce the banner on that one.

21 Me HÉLÈNE D'IORIO:

22 Yes, it does for the Untied page but not for
23 the United, thank you.

1 BY Me LOUIS BELIVEAU:

2 139. Q. I am going to be asking you some of the
3 same questions, Mr. Wilson. Do you find anything,
4 referring in this case to the Untied exhibit, do
5 you find anything objectionable about this exhibit?

6 A. I fear we are back at the same place where
7 I would have to understand what you mean by
8 'objectionable'; if it is a legal representation I
9 wouldn't want to speak to that.

10 140. Q. Yes, do you find anything legally
11 objectionable about the exhibit, which in this case
12 is Exhibit 12, the Untied webpage of the 6th of
13 March 2007?

14 A. Not being a legal expert I couldn't answer
15 that question fairly.

16 141. Q. Do you find the logos similar between the
17 two productions that are in front of you? So, the
18 United and Untied logos, do you find them similar?

19 A. Yes, I do, very much so.

20 142. Q. Could you describe to me what those
21 similarities are?

22 A. The use of the colour, the shape of the
23 'U' or tulip, the font and typeface and space
24 separation of the letters of United and Untied all
25 seem very similar to me.

1 143. Q. Was United concerned about the use of the
2 word 'Untied', or concerned about the font being
3 used?

4 Me HÉLÈNE D'IORIO:

5 Concerned in what context now? Are you
6 referring to some other document, or?

7
8 BY Me LOUIS BELIVEAU:

9 144. Q. No, in this case when you are talking
10 about the words, is it the font or is it the word
11 that concerns you?

12 Me HÉLÈNE D'IORIO:

13 Okay, Mr. Beliveau you asked the witness the
14 question of what do you view as the
15 similarities between the two; he gave you what
16 the similarities between the two are. I am
17 not sure there is a link to your next, which
18 is far broader.

19
20 BY Me LOUIS BELIVEAU:

21 145. Q. Let me try the next question: did United
22 have any concerns about trade marks or copyright at
23 this stage? So this would be as of the date of
24 this page.

25 A. While I wasn't at United at this time I

1 know that every company I have worked for is always
2 very concerned about misuse of its trade marks and
3 copyrights, and I would imagine United would be no
4 different.

5 146. Q. Could you undertake to find out?

6 Me HÉLÈNE D'IORIO:

7 We will take that under advisement.

8
9 UNDERTAKING NO. 15: To verify if United had
10 any concerns about trade marks or copyright at
11 the date of Exhibits 12. [Under Advisement]
12

13 BY Me LOUIS BELIVEAU:

14 147. Q. Okay, and the next question, which I
15 imagine you will also want to take under advisement
16 is: Was United concerned about the use of the word
17 'Untied' or was United concerned about the font?

18 Me HÉLÈNE D'IORIO:

19 We will take that under advisement.

20
21 OBJECTION NO. 22: Was United concerned about
22 the use of the word 'Untied' or was United
23 concerned about the font? [Under Advisement]
24
25

1 BY Me LOUIS BELIVEAU:

2 148. Q. Was United word about the colour scheme
3 employed in the logo or the webpage layout?

4 Me HÉLÈNE D'IORIO:

5 We will take that under advisement.
6

7 OBJECTION NO. 23: Was United word about the
8 colour scheme employed in the logo or the
9 webpage layout? [Under Advisement]
10

11 BY Me LOUIS BELIVEAU:

12 149. Q. Was United worried that this might be
13 infringing on United's trade marks or copyrights?

14 Me HÉLÈNE D'IORIO:

15 Yes, we will take that under advisement.
16

17 OBJECTION NO. 24: Was United worried that
18 this might be infringing on United's trade
19 marks or copyrights? [Under Advisement]
20

21 BY Me LOUIS BELIVEAU:

22 150. Q. Did United Airlines protest or communicate
23 its concerns to Dr. Cooperstock in any way at this
24 time?
25

1 Me HÉLÈNE D'IORIO:

2 So we are what, are you talking about the
3 2007?

4 THE WITNESS:

5 2007?

6
7 BY Me LOUIS BELIVEAU:

8 151. Q. 2007.

9 A. Offhand, I am not aware of any.

10 152. Q. Could you undertake to find out?

11 Me HÉLÈNE D'IORIO:

12 Yes, we will take that under advisement.

13
14 UNDERTAKING NO. 16: To verify if United
15 Airlines protested or communicated its
16 concerns to Dr. Cooperstock in any way in
17 2007. [Under Advisement]

18
19 BY Me LOUIS BELIVEAU:

20 153. Q. Did United contemplate legal action?

21 Me HÉLÈNE D'IORIO:

22 Oh, I instruct the witness not to answer the
23 question; that is privileged information.

1 OBJECTION NO. 25: Did United contemplate
2 legal action?

3
4 BY Me LOUIS BELIVEAU:

5 154. Q. Okay. Did United instruct counsel to
6 issue a take-down notice?

7 Me HÉLÈNE D'IORIO:

8 Yes, I instruct the witness not to answer the
9 question on the ground that it is privileged
10 information.

11
12 OBJECTION NO. 26: Did United instruct counsel
13 to issue a take-down notice?

14
15 BY Me LOUIS BELIVEAU:

16 155. Q. Did United Airlines threaten to sue?

17 Me HÉLÈNE D'IORIO:

18 I believe you already asked the question.

19 Me LOUIS BELIVEAU:

20 Yes, I know, but I asked the same questions
21 about a page several years before; I am asking
22 the same questions about this new page, so
23 they are the same questions but they are not
24 at the same point in time.
25

1 Me HÉLÈNE D'IORIO:

2 No, I think you asked this particular question
3 about this page, but I might be mistaken, but
4 we will take that under advisement. Do you
5 mean threatened by writing to Mr. Cooperstock?

6 Me LOUIS BELIVEAU:

7 Yes.

8 Me HÉLÈNE D'IORIO:

9 That we will take that --

10
11 Me LOUIS BELIVEAU:

12 156. Q. Was Mr. Cooperstock issued with the threat
13 of a lawsuit over this page, the one that we are
14 looking at, March 6, 2007?

15 Me HÉLÈNE D'IORIO:

16 Yes, we will take that under advisement.

17
18 OBJECTION NO. 27: Was Mr. Cooperstock issued
19 with the threat of a lawsuit over this page,
20 the one that we are looking at, March 6, 2007?

21 [Under Advisement]

22
23 BY Me LOUIS BELIVEAU:

24 157. Q. Why did United Airlines do nothing about
25 it?

1 OBJECTION NO. 28: Why did United Airlines do
2 nothing about it? [Under Advisement]

3
4 Me HÉLÈNE D'IORIO:

5 Well, you have asked a whole set of questions
6 as to whether they did anything, and now you
7 are kind of reaching a conclusion, which again
8 I am not following. Is it that you know the
9 answer to your own questions?

10 Me LOUIS BELIVEAU:

11 Well, I think I do, I am not sure, but
12 assuming that the answer is no then I would
13 like to ask the question. Since you are not
14 able to answer the question, I do want to get
15 it on the record so that you can answer them
16 later, and, you know, if you want to answer
17 the question based on that assumption, that is
18 okay, but I imagine you are probably going to
19 want to take it under advisement because you
20 took the preceding question to which this is
21 the follow-up, as well.

22 Me HÉLÈNE D'IORIO:

23 That is correct.
24
25

1 BY Me LOUIS BELIVEAU:

2 158. Q. But I do want to get it on the record.

3 So, the question is, Mr. Wilson, why did United
4 Airlines do nothing about it?

5 Me HÉLÈNE D'IORIO:

6 We will take that under advisement.

7
8 BY Me LOUIS BELIVEAU:

9 159. Q. And why didn't United Airlines threaten
10 legal action?

11 Me HÉLÈNE D'IORIO:

12 We will take that under advisement.

13
14 OBJECTION NO. 29: And why didn't United
15 Airlines threaten legal action? [Under
16 Advisement]

17
18 BY Me LOUIS BELIVEAU:

19 160. Q. Moving on, we are going to have Exhibit 13
20 and 14, which is -- no, sorry, Dr. Cooperstock, if
21 you could please --

22 Mr. JEREMY COOPERSTOCK:

23 That would be, 13 is the United Airlines
24 webpage of March 2, 2011.

1 Me LOUIS BELIVEAU:

2 Yes.

3 Mr. JEREMY COOPERSTOCK:

4 And Exhibit number 14 is the logo that
5 archive.org captured separately; it is not
6 appearing in the page itself, from that same
7 point. Exhibit number 15 is the state of
8 Untied.com from September 3, 2011, defendant's
9 production 9553.

10
11 EXHIBIT NO. 13: United Airlines webpage of
12 March 2, 2011.

13
14 EXHIBIT NO. 14: Logo that archive.org
15 captured separately.

16
17 EXHIBIT NO. 15: State of Untied.com on
18 September 3, 2011 (defendant's production
19 9553).

20
21 BY Me LOUIS BELIVEAU:

22 161. Q. So, Mr. Wilson, you have all of these in
23 front of you?

24 A. Yes.

25 162. Q. And I am going to ask you the same

1 questions again. I imagine we will probably get
2 some of the same answers. So we are now dealing
3 with 2011, so we are much closer to the current
4 time. Do you find anything objectionable, that is
5 legally objectionable, about the Untied webpage
6 that is presented to you in September 3, 2011?

7 A. Sorry, I have to give the same answer, but
8 it is I am not a legal expert--

9 163. Q. That is okay.

10 A. I am not a legal expert, and I wouldn't
11 want to speak to a legal perspective.

12 164. Q. That is okay, and I do realize we will get
13 the same answers, I just want to get them all on
14 the record so you can take them under advisement
15 and answer them later. As a follow-up question,
16 could you please elaborate on what you find
17 objectionable? If you can undertake to answer
18 that, that would be good, if anything.

19 Me HÉLÈNE D'IORIO:

20 We will take that under advisement.

21 Me LOUIS BELIVEAU:

22 Okay.

23
24 UNDERTAKING NO. 17: To verify if there is
25 anything that is legally objectionable about

1 the Untied webpage that was presented in
2 September 3, 2011, and if so, provide an
3 explanation. [Under Advisement]
4

5 BY Me LOUIS BELIVEAU:

6 165. Q. The next question: Do you find the logo on
7 the Untied page similar to that? Do you find the
8 United logo similar to that on the Untied page?

9 A. I find the Untied logo to be very similar
10 to the United logo, yes.

11 166. Q. Did you have, independently, concerns
12 about trade marks or copyright at this stage?

13 A. United, and now that we are in the era
14 that I have been at United, I know that United is
15 very concerned about the misuse of its trade marks
16 and copyright material.

17 167. Q. Okay, I understand that in a general
18 sense. Could you please tell me if United had
19 concerns about this specific incident?

20 A. United has concerns about Untied.com's use
21 of United's trade marks and copyrights, and this is
22 an example of that misuse.

23 168. Q. Okay, let me restate the question more
24 clearly. On the 3rd of September 2011 did United
25 have concerns about trade mark or copyright issues

1 regarding the Untied.com webpage?

2 A. I couldn't speak to the third of
3 September.

4 169. Q. Okay, could you please undertake to find
5 out?

6 Me HÉLÈNE D'IORIO:

7 I will take that under advisement.

8
9 UNDERTAKING NO. 18: To verify if United had
10 concerns about trade mark or copyright issues
11 regarding the Untied.com webpage on September
12 3, 2011. [Under Advisement]

13
14 BY Me LOUIS BELIVEAU:

15 170. Q. Okay, and as a follow-up question to also
16 be taken under advisement, I would like to ask if
17 United was concerned about the word 'Untied' or the
18 font?

19 Me HÉLÈNE D'IORIO:

20 Okay, we will take that under advisement.

21
22 OBJECTION NO. 30: Okay, and as a follow-up
23 question to also be taken under advisement, I
24 would like to ask if United was concerned
25 about the word 'Untied' or the font? [Under

1 Advisement]

2
3 BY Me LOUIS BELIVEAU:

4 171. Q. I would also like to ask was United
5 worried about the colour scheme employed in the
6 logo, or the webpage layout?

7 Me HÉLÈNE D'IORIO:

8 I will take that under advisement.
9

10 OBJECTION NO. 31: I would also like to ask
11 was United worried about the colour scheme
12 employed in the logo, or the webpage layout?
13 [Under Advisement]
14

15 BY Me LOUIS BELIVEAU:

16 172. Q. Was United worried that this might be
17 infringing on United's trade marks or copyright?

18 Me HÉLÈNE D'IORIO:

19 We will take that under advisement.
20

21 OBJECTION NO. 32: Was United worried that
22 this might be infringing on United's trade
23 marks or copyright? [Under Advisement]
24
25

1 BY Me LOUIS BELIVEAU:

2 173. Q. Okay, and I am going to ask the same
3 follow-up questions as before. Did United Airlines
4 protest or communicate its concerns to Dr.
5 Cooperstock in any way as of this, the 3rd of
6 September 2011?

7 A. I am not aware of specific communication
8 on the 3rd of September 2011.

9 174. Q. Okay, could you undertake to find out? I
10 mean, not on this date specifically, but around
11 this time? Could you please undertake to find out?

12 Me HÉLÈNE D'IORIO:

13 Yes, will take that under advisement.
14

15 UNDERTAKING NO. 19: To verify if United
16 Airlines protested or communicated its
17 concerns to Dr. Cooperstock in any way around
18 September 3, 2011. [Under Advisement]
19

20 BY Me LOUIS BELIVEAU:

21 175. Q. Did United contemplate legal action?

22 Me HÉLÈNE D'IORIO:

23 I instruct the witness not to answer the
24 question on the ground that it is privileged
25 information.

1 OBJECTION NO. 33: Did United contemplate
2 legal action?

3
4 BY Me LOUIS BELIVEAU:

5 176. Q. Did United instruct counsel to issue a
6 take-down notice? I am sure I will have the same
7 objection, correct?

8 Me HÉLÈNE D'IORIO:

9 That is correct, the same objection.
10

11 OBJECTION NO. 34: Did United instruct counsel
12 to issue a take-down notice?
13

14 BY Me LOUIS BELIVEAU:

15 177. Q. Did United Airlines threaten to sue? Did
16 United Airlines threaten Jeremy Cooperstock with a
17 lawsuit at this point?

18 A. I am not aware of United's threat to sue
19 around this time.

20 178. Q. Could you please undertake to find out
21 whether United Airlines threatened Jeremy
22 Cooperstock with a lawsuit as of or around the 3rd
23 of September 2011?

24 Me HÉLÈNE D'IORIO:

25 Yes, we will take that under advisement.

1 UNDERTAKING NO. 20: To verify whether United
2 Airlines threatened Jeremy Cooperstock with a
3 lawsuit as of or around the 3rd of September
4 2011. [Under Advisement]

5
6 BY Me LOUIS BELIVEAU:

7 179. Q. As a follow-up question, assuming that
8 your answer is going to be no, so it is ridiculous
9 right now, but: Why did United Airlines do nothing
10 about it, and why didn't United Airlines threaten
11 legal action? So, if you could please find out
12 those as well --

13 Mr. JEREMY COOPERSTOCK:

14 Maitre Beliveau, that was why did not United
15 Airlines threaten legal action?

16 Me LOUIS BELIVEAU:

17 That is right. Why did not.

18 Me HÉLÈNE D'IORIO:

19 Okay, we will take that under advisement, both
20 questions.

21 Me LOUIS BELIVEAU:

22 Sorry, my tongue slipped or something.

23
24 OBJECTION NO. 35: Why did United Airlines do
25 nothing about it, and why didn't United

1 Airlines threaten legal action? [Under
2 Advisement]

3
4 BY Me LOUIS BELIVEAU:

5 180. Q. Were there any discussions about this
6 website by United Airlines or Continental or
7 Management?

8 A. Sorry, once again please?

9 181. Q. Do you know if there were any discussions
10 about this website, Untied.com by United Airlines,
11 or it might be at the time Continental or United
12 Management?

13 A. I know that Untied.com was familiar to
14 members of United Airlines, and there have been
15 discussions about Untied.com.

16 182. Q. Moving on, we will move on to another area
17 of questioning.

18 Mr. JEREMY COOPERSTOCK:

19 Maitre Beliveau, I am just wondering if you
20 want to enter into the record, we have
21 Exhibits 16 -- my notes have Exhibit 16 and
22 17.

23 Me LOUIS BELIVEAU:

24 Oh, yes. We didn't enter them into the
25 record? I am sorry.

1 Mr. JEREMY COOPERSTOCK:

2 I just trying to make sure.

3
4 EXHIBIT NO. 16: State of the Untied.com
5 webpage on the 23rd of August 2012.

6
7 BY Me LOUIS BELIVEAU:

8 I beg your pardon, I did skip one. I beg your
9 pardon, Mr. Wilson, I extended the link, two
10 pages stuck together.

11 A. Okay.

12 183. Q. So we are not quite through this process
13 yet.

14 A. Okay.

15 184. Q. We have an Exhibit here, it is the state
16 of the Untied.com webpage on the 23rd of August
17 2012. I would like to ask you some questions about
18 it, please.

19 A. Okay.

20 185. Q. Do you find anything legally objectionable
21 about this exhibit, i.e. the webpage of Untied.com
22 of the 23rd of August 2012?

23 A. Well, at least I am consistent; I wouldn't
24 want to speak to a legal perspective on this.

25 186. Q. Okay, so do you find anything

1 objectionable in any other way?

2 A. If you could help me understand what you
3 mean by 'objectionable', a personal opinion about
4 design, about user experience, about layout?

5 187. Q. From a United Airlines point of view.

6 A. The use of the United Airlines trade marks
7 and copyright.

8 188. Q. Could you point to me, please, where these
9 trade marks and copyright are on this webpage?

10 189. Q. Sure, as they have throughout, the logo at
11 the top, the page layout, the colours, the fonts,
12 the design schema, many of the menus. It is a very
13 close facsimile of United.com.

14 190. Q. Do you find the logo similar to that used
15 by United?

16 Me HÉLÈNE D'IORIO:

17 Just to be clear for the record, given you are
18 not present, when you say 'logo' are you
19 referring to the word 'Untied', or are you
20 referring to the globe design?

21
22 BY Me LOUIS BELIVEAU:

23 I am referring to the frowning face with a
24 sort of circular, a square form around it, and
25 sort of an arc or something above it.

1 A. If you are referring to the use of the
2 United globe as the logo, or the totality of the
3 word 'United' with the United globe?

4 191. Q. For the first part of the question I am
5 referring to the object that is to the right of the
6 word 'Untied'?

7 Me HÉLÈNE D'IORIO:

8 And I believe the witness is referring to that
9 as 'the United globe'.

10
11 BY Me LOUIS BELIVEAU:

12 192. Q. Okay, and I am referring to it as the
13 frowning face; are we talking about the same thing
14 that is roughly square in shape?

15 A. I would ask you to point to it, but
16 unfortunately that is not possible. Maybe Jeremy
17 can do that.

18 193. Q. Dr. Cooperstock, perhaps you could point
19 to it.

20 A. Yes, that is the United globe.

21 194. Q. Okay, well I guess that is what you call
22 it. Do you find it is similar to the United logo?

23 A. It is the United logo. It has a red
24 frowny face and two eyes drawn on top of the United
25 logo, yes.

1 195. Q. Okay, now to the left of it, the word is
2 'Untied'. Are you concerned about those?

3 A. If you are asking me if I think they look
4 similar, yes, I do.

5 196. Q. Okay, in what way do they look similar?

6 A. The colour, the typeface, the separation
7 between the letters is, to me, clearly indicative
8 of the use of the United brand and the trade mark.

9 197. Q. I think there is a sort of blue or black
10 colour maybe, and there is sort of a reddish kind
11 of colour; which of those colours do you find is
12 indicative of the United trade mark?

13 A. The blue.

14 198. Q. The blue. What about the red?

15 A. Well, the red is not an exact copy of
16 United's trade mark.

17 199. Q. Does United use red in its trade mark?

18 A. United has historically used red in its
19 trade mark, and you will actually see that red
20 throughout previous versions of Untied.com, and
21 that red was brought over, it would appear to me,
22 to be on their current.

23 200. Q. As of the 23rd of August 2012 does United
24 use red in its trade mark?

25 A. United does not use red in the trade mark

1 that we are referring to, which is the United brand
2 name.

3 201. Q. Okay, so would it be fair to say that the
4 colours used in the Untied, I don't know what we
5 want to call it, words or logo, this thing on the
6 webpage and the United, what United claims is a
7 trade mark are not the same?

8 A. Let me make sure I am understanding, and I
9 know that Jeremy would understand this as well, you
10 know, if I turn in a homework assignment that I
11 have changed a word or two it is still plagiarism.
12 Yes, I agree that the red is not used in United's
13 trade mark today, but to me this is clearly a use
14 of United's trade mark with minor adjustments that
15 don't sufficiently avoid confusion.

16 202. Q. Okay, let me review. So the word here is
17 'Untied', and there are two red letters in the
18 middle, is that correct?

19 A. Yes.

20 203. Q. Just to verify, would it be fair to say
21 that you find that this is confusingly similar to
22 the words 'United' in blue?

23 Me HÉLÈNE D'IORIO:

24 Mr. Beliveau, I will object to that question.

25 That is a legal question; the test of

1 confusion between trade marks is one for the
2 Court and for expert witnesses.

3
4 OBJECTION NO. 36: Just to verify, would it be
5 fair to say that you find that this is
6 confusingly similar to the words 'United' in
7 blue?

8
9 BY Me LOUIS BELIVEAU:

10 I was just following up on Mr. Wilson's
11 previous statements, and I am just trying to
12 clarify for myself, but we can leave that
13 question for later.

14 204. Q. I would like to confirm that United is not
15 currently using any red colours in its logo?

16 A. If we are talking about the logo that has
17 the word 'United' as shown on Exhibit 14, you are
18 correct, there is no use of the colour red.

19 205. Q. Okay, moving on.

20 Mr. JEREMY COOPERSTOCK:

21 Maitre Beliveau, do you want to request that
22 they make an undertaking to deal with those
23 issues?

24 Me LOUIS BELIVEAU:

25 Yes, please, I would like to request that you

1 undertake to --

2 Me HÉLÈNE D'IORIO:

3 Undertake to do what?

4 Me LOUIS BELIVEAU:

5 To answer the question that wasn't answered.

6 Me HÉLÈNE D'IORIO:

7 Which one was that? I am sorry.

8 Me LOUIS BELIVEAU:

9 Regarding whether there is a similarity.

10 Me HÉLÈNE D'IORIO:

11 I think he answered that question. That

12 question was asked and answered; he pointed

13 out two similarities, but then you went on to

14 ask the question about confusingly similar, so

15 I don't know if you asked a different question

16 after that and maybe I missed it, but I --

17 Me LOUIS BELIVEAU:

18 Okay, fine, perhaps you are correct.

19 Me HÉLÈNE D'IORIO:

20 No, there is no undertaking.

21

22 BY Me LOUIS BELIVEAU:

23 206. Q. Okay, no undertaking. Could you explain

24 to me whether United Airlines protested or

25 communicated its concerns to Dr. Cooperstock in any

1 way as of the 23rd of August 2012?

2 A. At this point I do recall that there had
3 been some communication between Mr. Cooperstock and
4 United.

5 207. Q. Okay, did United contemplate legal action?

6 Me HÉLÈNE D'IORIO:

7 I instruct the witness not to answer that
8 question; that is privileged information, but
9 clearly a lawsuit has been commenced.

10 Me LOUIS BELIVEAU:

11 Yes, I suppose I already know the answer to
12 this one.

13 Me HÉLÈNE D'IORIO:

14 I think you do.

15
16 BY Me LOUIS BELIVEAU:

17 208. Q. Did United instruct counsel to issue a
18 take-down notice?

19 Me HÉLÈNE D'IORIO:

20 I instruct the witness not to answer the
21 question.

22
23 OBJECTION NO. 37: Did United instruct counsel
24 to issue a take-down notice?

1 BY Me LOUIS BELIVEAU:

2 209. Q. Did United Airlines threaten to sue? I
3 think you can answer that question; I mean, we sort
4 of all know the answer, so I will ask it again.
5 Did United Airlines threaten to sue?

6 A. I would only repeat that I know that there
7 is a suit that has been commenced, so --

8 210. Q. Okay. Were there any discussions about
9 this website, this specific version, the 23rd of
10 August 2012 by United Management?

11 A. Yes.

12 211. Q. Could you produce minutes and internal
13 correspondence of the meetings regarding the
14 discussions of Untied.com?

15 Me HÉLÈNE D'IORIO:

16 I refuse to answer that question; it is
17 irrelevant and it is confidential information.

18 Me LOUIS BELIVEAU:

19 I think it is very relevant, so I would like
20 to ask you to undertake to produce the minutes
21 and internal correspondence.

22 Me HÉLÈNE D'IORIO:

23 No, we are refusing to answer that question.

24 Me LOUIS BELIVEAU:

25 Yes, it is a request for undertaking. I don't

1 see what is confidential about it, Maitre
2 D'Iorio. I am not talking about
3 correspondence with you, which would be
4 legally privileged, I am talking about
5 internal discussions.

6 Me HÉLÈNE D'IORIO:

7 I am refusing to answer, and I am instructing
8 the witness not to answer the question. We
9 can debate it at the Motion, Mr. Beliveau.

10
11 UNDERTAKING NO. 21: To produce the minutes
12 and internal correspondence of the meetings of
13 United Airlines management regarding the
14 discussions of Untied.com about the 23rd of
15 August 2012 version of the website. [under
16 objection]

17
18 OBJECTION NO. 38: To Undertaking 21.

19
20 BY Me LOUIS BELIVEAU:

21 212. Q. Okay, we will debate it at the Motion.

22 Moving on -- okay, just one second please, I just
23 need to get my papers in order. Mr. Wilson,
24 regarding previous discussions in 2000 - 2007,
25 previous versions of this webpage, would you be

1 able to obtain for us minutes and internal
2 correspondence at United about the Untied.com
3 website?

4 Me HÉLÈNE D'IORIO:

5 Yes, we are refusing to answer that question
6 as well on the same ground, on the grounds
7 that have already been stated.

8 Me LOUIS BELIVEAU:

9 My understanding is that there was probably no
10 lawsuit, and I am not talking about
11 discussions with counsel, I am strictly
12 talking about internal discussions at the
13 time; you are refusing to produce those?

14 Me HÉLÈNE D'IORIO:

15 That is correct.

16 BY THE COURT REPORTER:

17 So is that an undertaking? Excuse me, excuse
18 me --

19 Me LOUIS BELIVEAU:

20 Could you please state, could you please
21 state, Maitre D'Iorio, since you answered the
22 question for Mr. Wilson, could you please
23 state why you are refusing to produce these?

24 Me HÉLÈNE D'IORIO:

25 Because it is not relevant to any of the

1 issues in the case.

2 Me LOUIS BELIVEAU:

3 Well, I think is very relevant to see why
4 there was a lawsuit now and there wasn't
5 before, and so I would like --

6 Me HÉLÈNE D'IORIO:

7 Well, that will be for you to argue before a
8 Court, Mr. Beliveau, okay?

9 Me LOUIS BELIVEAU:

10 Okay, I guess that is where we are heading.

11 Me HÉLÈNE D'IORIO:

12 Yes.

13 Me LOUIS BELIVEAU:

14 Yes, that was a request for an undertaking to
15 produce minutes from previous years.

16
17 UNDERTAKING NO. 22: To produce minutes and
18 internal correspondence at United Airlines
19 about the Untied.com website. [under
20 objection]

21
22 OBJECTION NO. 39: To Undertaking 22.

23
24 Me LOUIS BELIVEAU:

25 Well, we are going to move on from this issue,

1 A. If you will allow me a minute to look at
2 this --

3 351. Q. Sure.

4 A. Yes, Untied.com claims they had put a new
5 form online with the ability to copy complaints
6 directly to those two individuals.

7 352. Q. Now, that is what you are reading on the
8 form?

9 A. Yes.

10 353. Q. Is that, to United's knowledge, was this
11 what was actually happening?

12 A. You are asking about my knowledge of
13 Untied.com and its website practices? I wouldn't
14 want to speak to that.

15 354. Q. I am asking whether -- well, let me ask
16 the next question which I think will effectively do
17 this as well. Approximately how many complaints
18 were forwarded from Untied.com to United Airlines
19 since October 1998?

20 A. I don't have an exact number.

21 355. Q. Would you be able to find out, please?

22 Me HÉLÈNE D'IORIO:

23 Excuse me, can you clarify? What period of
24 time, and from where? From these two
25 individuals?

1 Me LOUIS BELIVEAU:

2 From October 1998 to any email addresses at
3 United Airline, so how many complaints were
4 forwarded via and from Untied.com to United
5 Airlines since October 1998.

6 Me HÉLÈNE D'IORIO:

7 Via Untied.com, is that what you are --

8 Me LOUIS BELIVEAU:

9 Yes. Let's say October 1998 to September
10 2000, to these two individuals.

11 Me HÉLÈNE D'IORIO:

12 We will take that question under advisement,
13 but I fail to see its relevance.

14 Me LOUIS BELIVEAU:

15 Okay.

16
17 UNDERTAKING NO. 36: To indicate how many
18 complaints were forwarded via and from
19 Untied.com to United Airlines since October
20 1998 to September 2000 (Ms. Harvill and Mr.
21 Goodwin). [Under Advisement]

22
23 BY Me LOUIS BELIVEAU:

24 356. Q. Could you also look into how many such
25 complaints were forwarded after September 2000?

1 Me HÉLÈNE D'IORIO:

2 Are you still asking through the Untied.com
3 website?

4 Me LOUIS BELIVEAU:

5 Yes, so it is a follow-up to the question. I
6 am just trying to find out, just trying to
7 break it down to September 2000 and anything
8 after that.

9 Me HÉLÈNE D'IORIO:

10 Mr. Beliveau, I think I will refuse that
11 question because this is information that your
12 client has.

13 Me LOUIS BELIVEAU:

14 Okay, we will --

15 Me HÉLÈNE D'IORIO:

16 You are asking for traffic from his website to
17 United; this is information that you have, so
18 it does not make sense to be asking us to
19 provide you with this information.

20 Me LOUIS BELIVEAU:

21 I am indirectly asking for United's
22 confirmation that my client's records are
23 correct, but if you don't want to look into
24 it, that is okay.

25

1 Me HÉLÈNE D'IORIO:

2 Well, your client has not even produced his
3 record in any event, so --

4 Me LOUIS BELIVEAU:

5 Okay, well I would ask you, and again I would
6 ask you to extract this information and
7 produce it, because otherwise we will need
8 these at the trial.

9 Me HÉLÈNE D'IORIO:

10 Yes, but Mr. Beliveau, I am refusing to do so
11 because -- and I wish to point out to you that
12 if you need those at trial your client has not
13 produced -- to the best of my knowledge, these
14 records have not been produced. So, we have
15 not had an opportunity to ask questions about
16 them.

17 Me LOUIS BELIVEAU:

18 Okay, so let me just state for the record, we
19 have a refusal to produce records of the
20 complaints received by United Airlines via
21 Untied.com, is that correct?

22 Me HÉLÈNE D'IORIO:

23 That is correct, from October 1998 forward, I
24 would add.

25

1 Me LOUIS BELIVEAU:

2 Okay, well we will discuss that perhaps in a
3 Refusals Motion.

4
5 OBJECTION NO. 57: To produce records of the
6 complaints received by United Airlines via
7 Untied.com.

8
9 Me HÉLÈNE D'IORIO:

10 Excuse me, but you have not answered my -- has
11 a document otherwise been produced by Mr.
12 Cooperstock? I mean, is there a document
13 number you can give us where you -- you know,
14 you are talking about the records, and the
15 records of the defendant being accurate, and I
16 guess I would, just for my own -- given 11,000
17 documents were produced I would need to know
18 if there is such a production, and what number
19 it bears.

20 Me LOUIS BELIVEAU:

21 Well, right now we are asking the questions.

22 If you want to --

23 Me HÉLÈNE D'IORIO:

24 Yes, I understand, but it is a --
25

1 Me LOUIS BELIVEAU:

2 Okay, well we can get into these discussions
3 after. Right now, we are the ones asking the
4 questions. If you want to ask us for help in
5 looking through the documents, we --

6 Me HÉLÈNE D'IORIO:

7 No, no, I am not asking you for help.

8 Me LOUIS BELIVEAU:

9 We can help you with that after, but this
10 isn't the right time for it.

11 Me HÉLÈNE D'IORIO:

12 No, it is because you make threats, Mr.

13 Beliveau. You make threats, you say we will
14 go to the Court, we will use it at trial, you
15 haven't done this, you haven't done that, yet
16 when I ask a simple question did you,
17 yourself, produce those records, and which
18 would be very helpful, you choose to refuse to
19 answer, but that is okay.

20 BY Me LOUIS BELIVEAU:

21 Well, we can look into that later. Could you
22 please tell me, Mr. Wilson, when did Ms.
23 Harvill's email address cease accepting
24 forwarded complaints from Untied.com?

25 A. I don't have the answer.

1 357. Q. Could you please undertake to find out?

2 Me HÉLÈNE D'IORIO:

3 We are refusing to answer that question.

4
5 UNDERTAKING NO. 37: To provide the date when
6 Ms. Harvill's email address ceased accepting
7 forwarded complaints from Untied.com. [under
8 objection]

9
10 OBJECTION NO. 58: To Undertaking 37.

11
12 BY Me LOUIS BELIVEAU:

13 358. Q. Okay. Around the time of September 2000
14 what was the email address customercare@united.com
15 used for?

16 A. Could you ask that question again? Are
17 you referring to the document on Exhibit 23, or you
18 --

19 359. Q. It is more of a general question. So,
20 around the time of September 2000 what was the
21 email address customercare@united.com used for?

22 A. Unfortunately, I can't confirm there was
23 an email of that name, or what its purpose was
24 because I wasn't employed at that time.

25 360. Q. Could you please undertake to find out?

1 Me HÉLÈNE D'IORIO:

2 We will take that under advisement.

3
4 UNDERTAKING NO. 38: To verify what the email
5 address customercare@united.com was used for
6 around September 2000. [Under Advisement]
7

8 BY Me LOUIS BELIVEAU:

9 361. Q. Do you agree that after September 2000
10 Untied.com was forwarding passenger complaints to
11 customerservice@united.com?

12 A. Are you asking have we received complaints
13 via Untied.com?

14 362. Q. I think that is a reasonable way to
15 rephrase it. Do you agree that after September
16 2000 United Airlines was receiving forwarded
17 complaints from Untied.com to the email address
18 customercare@united.com?

19 A. While I can't speak to the date it
20 started, it is my understanding we have received
21 complaints via Untied.com.

22 363. Q. Could you please undertake to find out
23 whether this was the case in September 2000 and
24 after, and as relates to complaints sent
25 specifically to customercare@united.com, and until

1 when these were received at
2 customer care@united.com?

3 Me HÉLÈNE D'IORIO:

4 I will take that under advisement, although
5 again, I fail to see the relevance of the
6 question.

7
8 UNDERTAKING NO. 39: To verify whether during
9 and after September 2000 United Airlines
10 received forwarded complaints sent to
11 customer care@united.com from Untied.com, and
12 until when these were received at
13 customer care@united.com. [Under Advisement]

14
15 Me LOUIS BELIVEAU:

16 Well, I think the relevance is quite obvious;
17 I mean, the website -- I think customer care,
18 I think as we can see from the address itself
19 it is a general customer care address, and it
20 is the kind of place that complaints would
21 have normally been forwarded to, so I think
22 that is the relevance of the question.

23 Me HÉLÈNE D'IORIO:

24 Well no, but the relevance is in the context
25 of the proceeding, and the proceeding again,

1 the proceeding is with respect to copyright
2 and trade mark infringement and passing off.

3 So, once more, I am at a loss.

4 Me LOUIS BELIVEAU:

5 Well I am not, because you see a large part of
6 the defence here is going to be that there is
7 bad faith on the part of United, and we need
8 to ask these questions in order to establish
9 the bad faith of United.

10 Me HÉLÈNE D'IORIO:

11 But, Mr. Beliveau, bad faith is not a defence,
12 I hate to tell you this. Bad faith is not a
13 defence to trade mark or copyright
14 infringement or passing off.

15 Me LOUIS BELIVEAU:

16 Yes, however you see there are certain aspects
17 --

18 Me HÉLÈNE D'IORIO:

19 And furthermore, you have not pleaded it.

20 Me LOUIS BELIVEAU:

21 Yes, we did, and if you look at paragraph 60
22 of the Amended Statement of Defence you will
23 see that, and you will see how it can be
24 relevant to some aspects of this case, and as
25 for the law on how bad faith can apply, well

1 we leave that for the appreciation of the
2 judge and we won't bore Mr. Wilson with it
3 right now. So that is how this is relevant,
4 and what -- I am trying to establish bad faith
5 here, so it is in this context I am actually
6 going to ask Mr. Wilson:

7 364. Q. What did United Airlines do with the
8 complaints that were forwarded from Untied.com?

9 Me HÉLÈNE D'IORIO:

10 And I will instruct the witness not to answer
11 the question.

12
13 OBJECTION NO. 59: What did United Airlines do
14 with the complaints that were forwarded from
15 Untied.com?

16
17 BY Me LOUIS BELIVEAU:

18 365. Q. Mr. Wilson, why did United sever this
19 direct communication link for complaints submitted
20 through Untied.com?

21 Me HÉLÈNE D'IORIO:

22 And I instruct the witness not to answer the
23 question.

24
25 OBJECTION NO. 60: Mr. Wilson, why did United

1 sever this direct communication link for
2 complaints submitted through Untied.com?

3
4 BY Me LOUIS BELIVEAU:

5 366. Q. Mr. Wilson, did United Airlines no longer
6 wish to receive complaints from its passengers?

7 Me HÉLÈNE D'IORIO:

8 I instruct the witness not to answer the
9 question.

10
11 OBJECTION NO. 61: Mr. Wilson, did United
12 Airlines no longer wish to receive complaints
13 from its passengers?

14
15 BY Me LOUIS BELIVEAU:

16 367. Q. Mr. Wilson, how many passenger complaints
17 does United receive every year?

18 Me HÉLÈNE D'IORIO:

19 I instruct the witness not to answer the
20 question.

21
22 OBJECTION NO. 62: Mr. Wilson, how many
23 passenger complaints does United receive every
24 year?

1 BY Me LOUIS BELIVEAU:

2 368. Q. Mr. Wilson, how many complaints has United
3 received since the merger with Continental?

4 Me HÉLÈNE D'IORIO:

5 I instruct the witness not to answer the
6 question.

7
8 OBJECTION NO. 63: Mr. Wilson, how many
9 complaints has United received since the
10 merger with Continental?

11
12 BY Me LOUIS BELIVEAU:

13 369. Q. Mr. Wilson, how many form letters have
14 been sent out in reply to passenger complaints,
15 i.e. response letters that re-use the same
16 paragraph of text?

17 Me HÉLÈNE D'IORIO:

18 I instruct the witness not to answer the
19 question.

20
21 OBJECTION NO. 64: Mr. Wilson, how many form
22 letters have been sent out in reply to
23 passenger complaints, i.e. response letters
24 that re-use the same paragraph of text?
25

1 the two airlines together doubled, roughly,
2 compared to the same period in 2011?

3 A. On a per 100,000 enplanements it did not
4 quite double.

5 434. Q. So we have gone from 882 to 1,740, so
6 approximately doubled, would it be fair to say
7 that?

8 A. The DOT report is per 100,000
9 enplanements, and on that basis it did not quite
10 double, but if we are talking approximations, sure.

11 435. Q. Okay, thank you. So would you say that
12 passengers were happy with the results of the
13 merger?

14 Me HÉLÈNE D'IORIO:

15 I instruct the witness not to answer that
16 question.

17
18 OBJECTION NO. 70: So would you say that
19 passengers were happy with the results of the
20 merger?

21
22 Me LOUIS BELIVEAU:

23 You mean you are advising him to not answer
24 that question?
25

1 Me HÉLÈNE D'IORIO:

2 I am instructing him not to answer the
3 question.

4 Me LOUIS BELIVEAU:

5 I am not sure you can instruct him, but you
6 can certainly advise him.

7 Me HÉLÈNE D'IORIO:

8 Well, I will do as I please, Mr. Beliveau. I
9 chose to instruct him.

10
11 BY Me LOUIS BELIVEAU:

12 436. Q. Okay. Mr. Wilson, are you choosing to
13 follow this advice, or will you answer the
14 question?

15 A. Yes.

16 437. Q. The next question: would you say that the
17 merger caused damage to the goodwill of United?

18 Me HÉLÈNE D'IORIO:

19 I instruct the witness not to answer the
20 question.

21
22 OBJECTION NO. 71: The next question: would
23 you say that the merger caused damage to the
24 goodwill of United?

1 Me LOUIS BELIVEAU:

2 Again, perhaps you could advise the witness.

3 Me HÉLÈNE D'IORIO:

4 Mr. Beliveau, I will object the way I want to
5 object, and that is the way it pleases me to
6 object. I mean, I do not think that you are
7 there to tell me how to object to a question.

8
9 BY Me LOUIS BELIVEAU:

10 438. Q. Okay. Just a minute, please, we are
11 getting some more questions, different questions.
12 Could you look at the Statement of Defence, please,
13 Mr. Wilson?

14 Mr. JEREMY COOPERSTOCK:

15 Exhibit 24.

16
17 BY Me LOUIS BELIVEAU:

18 439. Q. It is in Exhibit 24, if we don't have it
19 elsewhere, the amended Amended Statement of
20 Defence.

21 A. I have it.

22 440. Q. And if you could read in, please,
23 paragraph 55?

24 Mr. JEREMY COOPERSTOCK:

25 No, Mr. Beliveau, I think 54 is the --

1 Me LOUIS BELIVEAU:

2 54, you are right.

3 THE WITNESS:

4 All right, reading from the Amended Statement
5 of Defence, you wrote in paragraph 14: (sic)

6 "According to the United States Department of
7 Transportation the Plaintiff is the most
8 complained about airline. Thus, it is
9 unreasonable and ludicrous to allege that
10 damage to goodwill has its source in the
11 Defendant's actions."

12 441. Q. Okay. Could you please read paragraph 55,
13 as well?

14 A. All right, so you followed by saying, in
15 paragraph 55,

16 "Section 22 of the *Trade-marks Act* does not shield
17 the Plaintiff from the harmful ramifications of its
18 own treatment of passengers and/or its own
19 employees."

20 442. Q. Would you agree with me that the loss of
21 goodwill was a result of the bad treatment, and had
22 nothing to do with Dr. Cooperstock's alleged
23 actions?

24 Me HÉLÈNE D'IORIO:

25 I instruct the witness not to answer that

question; that is a legal question.

Me LOUIS BELIVEAU:

443. Q. And are you following that advice, Mr.
Wilson?

A. Yes, I am.

OBJECTION NO. 72: Would you agree with me
that the loss of goodwill was a result of the
bad treatment, and had nothing to do with Dr.
Cooperstock's alleged actions?

BY Me LOUIS BELIVEAU:

444. Q. We are going to move on to a different set
of questions, if you will just give me a minute to
get my exhibits in order.

Off-the-record discussion.

Me LOUIS BELIVEAU:

I would like to play a part of a video for
you, or actually --

Mr. JEREMY COOPERSTOCK:

So I will have to play it.

Me LOUIS BELIVEAU:

-- ask Dr. Cooperstock to do that, please.

1 Off-the-record discussion.

2
3 EXHIBIT NO. 29: CD containing two videos.

4
5 (COURT REPORTER'S NOTE: VIDEO PLAYED, EXHIBIT 29)

6
7 BY Me LOUIS BELIVEAU:

8 445. Q. Well, Mr. Wilson, I trust that you enjoyed
9 that. I have a question for you.

10 A. Sure.

11 446. Q. Are you familiar with this video, or is
12 this your first time seeing it?

13 A. I am familiar with that video.

14 447. Q. Are the events described in this video
15 true?

16 Me HÉLÈNE D'IORIO:

17 I would instruct the witness not to answer the
18 question. It is not relevant to any of the
19 issues of this case.

20 Me LOUIS BELIVEAU:

21 Well, I believe it is. I can see the
22 relevance. We are trying to calculate
23 possible damages that may be due to various
24 things that have happened to United at this
25 time. You are claiming damages against my

1 client; as a result, I think it is important
2 to filter out other possible sources of
3 damages. So on account of that I am asking
4 the following questions, the first one of
5 which is:

6 448. Q. Are the events described in the video
7 true?

8 Me HÉLÈNE D'IORIO:

9 I instruct the witness not to answer the
10 question.

11
12 OBJECTION NO. 73: Are the events described in
13 the video true? [exhibit 29]

14
15 BY Me LOUIS BELIVEAU:

16 449. Q. Have you calculated the amount of revenue
17 that United allegedly lost as a result of this
18 video?

19 Me HÉLÈNE D'IORIO:

20 I instruct the witness not to answer the
21 question.

22
23 OBJECTION NO. 74: Have you calculated the
24 amount of revenue that United allegedly lost
25 as a result of this video?

1 BY Me LOUIS BELIVEAU:

2 450. Q. Did United sue the individual who made
3 this video?

4 Me HÉLÈNE D'IORIO:

5 I instruct the witness not to answer the
6 question.

7
8 OBJECTION NO. 75: Did United sue the
9 individual who made this video?

10
11 Me LOUIS BELIVEAU:

12 Okay, since you are not answering that
13 question I will ask a follow-up question that
14 would have been asked otherwise, but isn't
15 going to make sense now, which is:
16 Why not? So I won't expect an answer to it
17 because of the history of it.

18 Me HÉLÈNE D'IORIO:

19 I am objecting.

20
21 OBJECTION NO. 76: Why not?

22
23 BY Me LOUIS BELIVEAU:

24 451. Q. I believe the man who made the video, I
25 believe his name is David Carroll. Would you agree

1 with me, Mr. Wilson, that this individual was
2 disparaging United Airlines?

3 Me HÉLÈNE D'IORIO:

4 I instruct the witness not to answer the
5 question.

6
7 OBJECTION NO. 77: I believe the man who made
8 the video, I believe his name is David
9 Carroll. Would you agree with me, Mr. Wilson,
10 that this individual was disparaging United
11 Airlines?

12
13 BY Me LOUIS BELIVEAU:

14 452. Q. What changes, if any, did United make as a
15 result of what it learned from this incident?

16 Me HÉLÈNE D'IORIO:

17 The same instruction, do not answer the
18 question.

19
20 OBJECTION NO. 78: What changes, if any, did
21 United make as a result of what it learned
22 from this incident?

23
24 Me LOUIS BELIVEAU:

25 Okay, well we will play the next video, then.

1 Mr. JEREMY COOPERSTOCK:

2 This one I suggest we just play a couple of
3 minutes of.

4 Me LOUIS BELIVEAU:

5 You are probably familiar with this one, but
6 let's --

7 Me HÉLÈNE D'IORIO:

8 I find this whole exercise is totally
9 irrelevant.

10 Me LOUIS BELIVEAU:

11 Ms. D'Iorio, I find the entire lawsuit fits
12 that description, but considering that you
13 started it, I think is very relevant to
14 establish any damages which may occur should
15 your claim -- should your claim be correct,
16 which of course we don't think it is, and so
17 it is important to separate that from other
18 possible sources of business damage to United.

19 THE COURT REPORTER:

20 Is this going to be an exhibit?

21 Mr. JEREMY COOPERSTOCK:

22 Yes.

23 Me HÉLÈNE D'IORIO:

24 Yes.

25

1 Mr. JEREMY COOPERSTOCK:

2 It is also the second item on the CD.

3 Me HÉLÈNE D'IORIO:

4 Oh, it is on the CD as well?

5 Mr. JEREMY COOPERSTOCK:

6 Yes.

7 Me HÉLÈNE D'IORIO:

8 Well, you should have told us because we are
9 marking exhibits without knowing -- we are
10 going on your representation that what was on
11 that CD was the last video. It is very
12 important that we know what is on these
13 videos.

14 Me LOUIS BELIVEAU:

15 Well, that was on the CD. There is something
16 else --

17 Mr. JEREMY COOPERSTOCK:

18 Yes, well it was on the CD that I handed to
19 you.

20 Me HÉLÈNE D'IORIO:

21 Well, no, what you represented to us as being
22 the last one we played; now you are telling me
23 there are other things on this. What else is
24 on this CD?

25

1 Mr. JEREMY COOPERSTOCK:

2 There are two videos on there, both of which
3 were provided to you as defendant's
4 productions.

5 Me HÉLÈNE D'IORIO:

6 It doesn't matter that they were provided to
7 us. Today we are marking it. I mean, we have
8 gone ahead and we have marked it, thinking it
9 was the thing you just played.

10 Mr. JEREMY COOPERSTOCK:

11 It was.

12 Me HÉLÈNE D'IORIO:

13 Now you are telling me there is something else
14 on it.

15 Mr. JEREMY COOPERSTOCK:

16 Yes, there are two videos.

17 Me HÉLÈNE D'IORIO:

18 Yes, but you have to tell us ahead of time.

19 We are not marking exhibits when you are
20 representing that there is one thing --

21 Me LOUIS BELIVEAU:

22 Ms. D'Iorio, I think you are making a big deal
23 out of nothing here.

24 Me HÉLÈNE D'IORIO:

25 No, I am not making a big deal out of nothing.

1 (COURT REPORTER'S NOTE: SECOND VIDEO PLAYED)

2
3 BY Me LOUIS BELIVEAU:

4 453. Q. Mr. Wilson?

5 A. Yes.

6 454. Q. Are you familiar with this video?

7 A. Actually, I have heard of this video; I
8 had not seen the video before.

9 455. Q. Okay, well this is your first time. The
10 second question: are the events described in this
11 video true?

12 Me HÉLÈNE D'IORIO:

13 I instruct the witness not to answer the
14 question.

15
16 OBJECTION NO. 79: The second question: are
17 the events described in this video true? [re
18 the second video played]

19
20 BY Me LOUIS BELIVEAU:

21 456. Q. Have you calculated the amount of revenue
22 that United allegedly lost as a result of this
23 video?

24 Me HÉLÈNE D'IORIO:

25 I instruct the witness not to answer the

1 question.

2
3 OBJECTION NO. 80: Have you calculated the
4 amount of revenue that United allegedly lost
5 as a result of this video?

6
7 BY Me LOUIS BELIVEAU:

8 457. Q. Did United sue Jim Stanek?

9 Me HÉLÈNE D'IORIO:

10 I instruct the witness not to answer the
11 question.

12
13 OBJECTION NO. 81: Did United sue Jim Stanek?

14
15 BY Me LOUIS BELIVEAU:

16 458. Q. The follow-up question would be: Why not?
17 Which you will not wish to answer.

18 Me HÉLÈNE D'IORIO:

19 And it is the same instruction not to answer.

20
21 OBJECTION NO. 82: Why not?

22
23 BY Me LOUIS BELIVEAU:

24 459. Q. The next question is: wasn't Jim Stanek
25 disparaging United Airlines?

1 Me HÉLÈNE D'IORIO:

2 The same instruction, do not answer the
3 question.

4
5 OBJECTION NO. 83: The next question is:
6 wasn't Jim Stanek disparaging United Airlines?

7
8 BY Me LOUIS BELIVEAU:

9 460. Q. What changes did United make as a result
10 of what was learned from this incident?

11 Me HÉLÈNE D'IORIO:

12 The same instruction to the witness, do not
13 answer the question.

14
15 OBJECTION NO. 84: What changes did United
16 make as a result of what was learned from this
17 incident?

18
19 BY Me LOUIS BELIVEAU:

20 461. Q. Moving on from the audios and videos, Mr.
21 Wilson, could you please detail the types of
22 damages or prejudice that United suffered as a
23 result of the alleged infringements by Untied.com?

24 A. Would I please detail the damages?

25 462. Q. Yes, damages or prejudice that United

1 suffered as a result of the alleged infringements
2 by Untied.com?

3 Me HÉLÈNE D'IORIO:

4 Mr. Beliveau, this is a legal question.

6 BY Me LOUIS BELIVEAU:

7 Ms. D'Iorio, I am asking for an amount of
8 money which in the opinion of United Airlines
9 it suffered as damages; I don't think that
10 that is a legal question.

11 A. So any time anyone uses one of our trade-
12 marked terms or copyright material in a way that is
13 not sanctioned by the brand that owns it, we find
14 that there could be -- there could be
15 misrepresentation, there could be misunderstanding,
16 there could be confusion as to who is saying the
17 things that they are saying or doing the things
18 that they are doing, and any of these things would
19 contribute towards our feelings about how that sort
20 of activity should stop.

21 463. Q. Okay, I am looking for specific answers,
22 so specific type of damages, specific dollar
23 amounts, specific prejudice that United suffered or
24 claims to suffer as a result of the infringement
25 which it alleges that Untied.com/ Jeremy

1 Cooperstock is responsible for?

2 Me HÉLÈNE D'IORIO:

3 Mr. Beliveau, this is a question for an expert
4 witness, the evaluation of damages is for
5 expert witnesses.

6 Me LOUIS BELIVEAU:

7 One second, please, let me find your Statement
8 of Claim; if you could please pull out the
9 Statement of Claim again, your Amended
10 Statement of Claim.

11 Mr. JEREMY COOPERSTOCK:

12 What page?

13 Me LOUIS BELIVEAU:

14 On page 4 you have (h). So in your Statement
15 of Claim what it says is, it says 'Damages,
16 profits and statutory damages or whichever one
17 or more of those that the plaintiff may like
18 after due inquiry.' So I would like to know,
19 Mr. Wilson, I would like you to make a claim;
20 I would like you to say what damage United
21 feels that it has suffered as a result of what
22 it alleges is due to my client's infringement.

23 Me HÉLÈNE D'IORIO:

24 Mr. Beliveau, this is not a question that the
25 witness can answer; it is a question for

1 expert testimony. That is how damages are
2 assessed and evaluated in intellectual
3 property cases.

4
5 OBJECTION NO. 85: Okay, I am looking for
6 specific answers, so specific type of damages,
7 specific dollar amounts, specific prejudice
8 that United suffered or claims to suffer as a
9 result of the infringement which it alleges
10 that Untied.com/ Jeremy Cooperstock is
11 responsible for?

12
13 BY Me LOUIS BELIVEAU:

14 464. Q. Would it be fair to say, Mr. Wilson, that
15 you are currently not claiming an amount of
16 damages? Could you provide a quantification of any
17 damages that you are claiming, or are you not
18 claiming? I am trying to understand here what it
19 is you are claiming.

20 Me HÉLÈNE D'IORIO:

21 Mr. Beliveau, the Statement of Claim is worded
22 in the usual way the Statements of Claim are
23 worded in intellectual property cases. We are
24 claiming damages, profits, or statutory
25 damages as we may elect, and this will be the

1 I may have asked this before, so if I have
2 please tell me.

3 493. Q. Which witnesses does United intend to
4 call?

5 Me HÉLÈNE D'IORIO:

6 I instruct the witness not to answer that
7 question.

8
9 OBJECTION NO. 91: Which witnesses does United
10 intend to call?

11
12 Me LOUIS BELIVEAU:

13 494. Q. This is other than experts, which non-
14 expert witnesses do you intend to call?

15 Me HÉLÈNE D'IORIO:

16 You will be advised of that in due course, but
17 not at this point.

18 Me LOUIS BELIVEAU:

19 I think that this would be an appropriate
20 point to be advised of which witnesses you
21 intend to call. I think it is a legitimate
22 question, and I would like you to consider
23 answering it.

24 Me HÉLÈNE D'IORIO:

25 We are refusing it.

1 OBJECTION NO. 92: This is other than experts,
2 which non-expert witnesses do you intend to
3 call?

4
5 BY Me LOUIS BELIVEAU:

6 495. Q. Okay. The witnesses that you may or may
7 not call, on what topics or areas will these
8 witnesses be testifying?

9 Me HÉLÈNE D'IORIO:

10 The same instruction to the witness not to
11 answer.

12
13 OBJECTION NO. 93: The witnesses that you may
14 or may not call, on what topics or areas will
15 these witnesses be testifying?

16
17 BY Me LOUIS BELIVEAU:

18 I do want to put this on the record; the
19 purpose of discovery is to allow a plaintiff
20 or defendant, in this case the defendant, to
21 find out more about the case. One of the
22 reasons to do so is that one can evaluate what
23 is out there, what the evidence is, what the
24 potential damages are. This can be useful for
25 a variety of different reasons. One of the

1 OBJECTION NO. 99: Does United have plans to
2 modify the layout of its web pages at any
3 point in the future?
4

5 BY Me LOUIS BELIVEAU:

6 546. Q. Okay. Does United have plans to modify
7 its logo at any point in the future?

8 Me HÉLÈNE D'IORIO:

9 The same instruction to the witness.
10

11 OBJECTION NO. 100: Does United have plans to
12 modify its logo at any point in the future?
13

14 Me LOUIS BELIVEAU:

15 I am not asking if it is being done, I am just
16 asking if you have any plans, but okay.

17 Me HÉLÈNE D'IORIO:

18 That doesn't change the answer.
19

20 BY Me LOUIS BELIVEAU:

21 547. Q. I would like to show you, I think we will
22 just move on on that one. I would like to show you
23 another exhibit; Dr. Cooperstock can perhaps hand
24 it to -- I think it will be 32. Dr. Cooperstock
25 can perhaps hand it to Mr. Wilson.

1 Mr. JEREMY COOPERSTOCK:

2 Done.

3
4 EXHIBIT NO. 32: Amplicate webpage.

5
6 BY Me LOUIS BELIVEAU:

7 548. Q. This is what I will call the Amplicate
8 page. Are you familiar with this webpage?

9 A. I am actually not familiar with
10 amplicate.com.

11 549. Q. Do you agree with me, however, that the
12 image shown on this webpage, sort of at the right,
13 is a trade mark of United Airlines, sort of at
14 right when you put it in a landscape mode, at the
15 right, roughly in the middle?

16 A. I would agree it is the United tulip, yes.

17 550. Q. Yes, okay. What sort of legal action has
18 United Airlines taken against Amplicate?

19 Me HÉLÈNE D'IORIO:

20 I instruct the witness not to answer the
21 question.

22
23 OBJECTION NO. 101: What sort of legal action
24 has United Airlines taken against Amplicate?

1 BY Me LOUIS BELIVEAU:

2 551. Q. Has United Airlines threatened Amplicate
3 in any way, I mean with threats of legal action?

4 Me HÉLÈNE D'IORIO:

5 The same instruction.
6

7 OBJECTION NO. 102: Has United Airlines
8 threatened Amplicate in any way, I mean with
9 threats of legal action?
10

11 BY Me LOUIS BELIVEAU:

12 552. Q. The follow-up question would have been:
13 Why not? But that will also be the same
14 instruction, I am sure.

15 Me HÉLÈNE D'IORIO:

16 That is correct.
17

18 OBJECTION NO. 103: Why not?
19

20 Off-the-record discussion.
21

22 BY Me LOUIS BELIVEAU:

23 553. Q. Let's look at our next exhibit, perhaps
24 Dr. Cooperstock can pass that one out.
25

1 Mr. JEREMY COOPERSTOCK:

2 Done.

3
4 EXHIBIT NO. 33: Goldring Travel's This Is My
5 Yacht Cruise & Travel BlogSpot.

6
7 BY Me LOUIS BELIVEAU:

8 554. Q. It is Goldring Travel BlogSpot, and it is
9 the same question to Mr. Wilson: are you familiar
10 with this webpage?

11 A. No, I am not.

12 555. Q. Do you agree with me that the image shown
13 on his webpage, that is roughly in the middle of
14 it, is a trade mark of United Airlines?

15 A. That is the United name and the United
16 globe used in our style.

17 556. Q. Okay, and the next three questions are:
18 What sort of threats of legal action has United
19 Airlines taken against Goldring Travels (sic)?

20 Me HÉLÈNE D'IORIO:

21 Yes, and I instruct the witness not to answer.

22
23 OBJECTION NO. 104: What sort of threats of
24 legal action has United Airlines taken against
25 Goldring Travels (sic)?

1 BY Me LOUIS BELIVEAU:

2 557. Q. Has United Airlines taken legal action
3 against Goldring Travels (sic)?
4

5 OBJECTION NO. 105: Has United Airlines taken
6 legal action against Goldring Travels (sic)?
7

8 Me HÉLÈNE D'IORIO:

9 The same instruction, and -- Why not?
10

11 OBJECTION NO. 106: And why not?
12

13 Me LOUIS BELIVEAU:

14 And why not? The same.
15

16 Off-the-record discussion.
17

18 BY Me LOUIS BELIVEAU:

19 We have got another Exhibit, 34. Dr.

20 Cooperstock, if you could perhaps pass it, as
21 well, to Mr. Wilson.

22 Mr. JEREMY COOPERSTOCK:

23 Done.

24 THE WITNESS:

25 We have got it.

1 EXHIBIT NO. 34: Change.org, United Airlines
2 Unaccompanied Minor Program.

3
4 BY Me LOUIS BELIVEAU:

5 558. Q. We have here a change.org, United Airlines
6 Unaccompanied Minor Program, which is defendant's
7 production 11786. Are you familiar with this
8 webpage, Mr. Wilson?

9 A. I am not.

10 559. Q. Do you agree with me that the image shown
11 on this webpage is a trade mark of United Airlines,
12 roughly 1/3 of the way down?

13 A. I agree that it uses the United globe and
14 the United name in the style that is usually
15 represented, yes.

16 560. Q. Okay, but you wouldn't say that it is a
17 trade mark of United Airlines?

18 A. This is a trade marked image and term.

19 561. Q. Of United Airlines?

20 A. Yes.

21 562. Q. Okay. What sort of threats of legal
22 action has United Airlines taken against
23 change.org?

24 Me HÉLÈNE D'IORIO:

25 I will instruct the witness not to answer.

1 OBJECTION NO. 107: What sort of threats of
2 legal action has United Airlines taken against
3 change.org?

4
5 BY Me LOUIS BELIVEAU:

6 563. Q. Has United Airlines taken legal action
7 against change.org?

8 Me HÉLÈNE D'IORIO:

9 The same instruction.

10
11 OBJECTION NO. 108: Has United Airlines taken
12 legal action against change.org?

13
14 BY Me LOUIS BELIVEAU:

15 564. Q. Why not?

16 Me HÉLÈNE D'IORIO:

17 The same instruction.

18
19 OBJECTION NO. 109: Why not?

20
21 BY Me LOUIS BELIVEAU:

22 565. Q. Okay. Let's turn now to --

23 Mr. JEREMY COOPERSTOCK:

24 Maitre Beliveau? Maitre Beliveau?

1 Me LOUIS BELIVEAU:

2 Yes.

3 Mr. JEREMY COOPERSTOCK:

4 Can I suggest?

5 Me LOUIS BELIVEAU:

6 Yes, perhaps what we should do with these
7 three, it would be the last three exhibits.

8 Mr. Wilson, perhaps you could undertake to
9 find out if anyone else at United Airlines is
10 familiar with these webpages, and whether
11 anything has being done about them.

12 Me HÉLÈNE D'IORIO:

13 Well, I can certainly take under advisement
14 whether or not anyone else knows about them,
15 but the answer to your second question will be
16 a refusal like -- it is the same question,
17 basically.

18 Me LOUIS BELIVEAU:

19 Okay. The follow-up question in each case
20 would be when they became aware of the
21 particular page.

22 Me HÉLÈNE D'IORIO:

23 Okay, we will take that under advisement.

24

25 UNDERTAKING NO. 47: To verify if anyone else

1 at United Airlines is familiar with the
2 webpages in Exhibits 32, 33, and 34, and to
3 indicate when anyone at United Airlines became
4 aware of the particular pages [Under
5 Advisement] as well as to indicate whether
6 anything has been done about them. [under
7 objection]

8
9 OBJECTION NO. 110: To the second part of
10 Undertaking 47.

11
12 BY Me LOUIS BELIVEAU:

13 566. Q. Now, let's turn to the July 16, 2012
14 letter from Mr. Michael Henning to Dr. Cooperstock.
15 Dr. Cooperstock, I think this will be Exhibit 35,
16 if you could please hand it to Mr. Wilson?

17 Mr. JEREMY COOPERSTOCK:

18 Done.

19
20 EXHIBIT NO. 35: Letter dated July 16, 2012 to
21 Mr. Jeremy Cooperstock from Mr. Michael C.
22 Henning.

23
24 BY Me LOUIS BELIVEAU:

25 567. Q. Do you have it?

1 States?

2 676. Q. Yes, primarily in the United States, and
3 primarily for customers facing things such as the
4 website, so let me rephrase that. What domain name
5 was United Airlines primarily using for its website
6 in the United States in September 1997?

7 A. I know that for many years United was
8 using the domain name UAL.com, and then it changed
9 to United.com.

10 677. Q. Could you please tell me if in September
11 1997 United Airlines was using UAL.com?

12 A. Sorry, that is why I answered that way; I
13 can't tell you the exact date that we made the
14 switch.

15 678. Q. Okay, no, that is fine. Could you please
16 undertake to find it when you made the switch?

17 A. Yes.

18
19 UNDERTAKING NO. 51: To indicate if United
20 Airlines was using the domain name UAL.com in
21 September 1997.

22
23 BY Me LOUIS BELIVEAU:

24 679. Q. Thank you. Could you also tell me what
25 domain name United Airlines is using today?

1 A. Again, the primary US website is
2 United.com.

3 680. Q. Okay, that is fine, that is all I wanted
4 to know. Could you please tell me, and we will
5 produce here an exhibit. Dr. Cooperstock, if you
6 could produce this, 42; it is the Untied.com
7 registration. We will add it as an exhibit.

8
9 EXHIBIT NO. 42: Untied.com registration.

10
11 BY Me LOUIS BELIVEAU:

12 681. Q. Could you please tell me, looking at this
13 paper, when Untied.com was registered as a domain
14 name?

15 A. It was created 24 April 1997.

16 682. Q. Okay, thank you. And now, I think it
17 would be fair to say, based on the previous
18 questions, that by September 1997 United was aware
19 of the Untied.com website. I am thinking of the
20 Chicago Tribune article and like matters; would you
21 agree with me?

22 A. We have agreed that in the Chicago Tribune
23 article of 1997 it would appear as though there was
24 a realization of Untied.com.

25 683. Q. Okay, thank you. Now, are UAL.com and

1 Untied.com similar names?

2 A. Are they similar names?

3 684. Q. Yes.

4 A. No.

5 685. Q. When was United.com registered?

6 A. You asked me that; I have said I am not
7 sure.

8 686. Q. No, United. Now, Dr. Cooperstock if you
9 could please hand our next exhibit to the
10 plaintiff?

11 A. Okay.

12
13 EXHIBIT NO. 43: WHOis.net printout for
14 United.com.

15
16 BY Me LOUIS BELIVEAU:

17 687. Q. It is WHOis.net printout for United.com.

18 A. Yes.

19 688. Q. If you could please look at it, refer to
20 it, and tell me when United.com was created?

21 A. December 17, 1998, which it turns out I
22 can tell you was a Thursday.

23 689. Q. Okay. Thank you.

24 Me HÉLÈNE D'IORIO:

25 So it seems that this would now answer the

1 last undertaking we gave you.

2
3 BY Me LOUIS BELIVEAU:

4 Thank you. Now when did United switch from
5 using UAL.com to United.com; you are going to
6 be getting me an answer to that.

7 690. Q. Now, are United.com and Untied.com similar
8 names?

9 A. Yes.

10 691. Q. Do you find them more similar than UAL.com
11 and Untied.com?

12 A. Yes.

13 692. Q. Earlier it became clear that United was
14 aware of Dr. Cooperstock's domain name, Untied.com,
15 at the time when United Airlines was using UAL.com.
16 Given that United and Untied are more similar, why
17 did United Airlines knowingly switch to using
18 United.com given that United was aware of
19 Untied.com already being in existence?

20 A. Well, you realize that United and United
21 Airlines is a trade mark and a brand that has been
22 in existence since the early part of the 20th
23 century, so certainly those are the names that our
24 consumers know us by best, and when we have the
25 opportunity to purchase and use the name 'United'

1 as part of our domain that was clearly in the best
2 interests of creating a logical connection for our
3 customers using, at the time, a new distribution
4 channel for the company.

5 693. Q. I understand that, but you see -- would it
6 be fair to say that UAL is also a brand or a name
7 that United Airlines is well known by?

8 A. Certainly not as well as United or United
9 Airlines. UAL was a corporate entity that was not
10 created concurrently in the early part of the 20th
11 century, and it is certainly not how many of our
12 customers refer to us.

13 694. Q. In that case, why in 1997/1998 why did
14 United operate its website as UAL.com instead of
15 United.com when both were available for
16 registration? What was UAL.com the choice for the
17 website?

18 A. You did make one presumption, that
19 United.com was available. I actually am not aware
20 of the transaction that occurred that allowed us to
21 get that domain, United.com. As Jeremy know, that
22 domains were grabbed and sat upon, and some people
23 were willing to sell them and transact them, and
24 some people are not, so until we understand how we
25 came about the ownership of United.com I think that

1 would be a tricky question to try to answer.

2 695. Q. We earlier established by looking at the
3 exhibit with the registration that it was created
4 in 1998, and not transferred in 1998.

5 A. That is not the way WHOis.net works, so I
6 apologize if you are confused on that point.

7 696. Q. In that case, let me ask a different
8 questions. Could you please tell me at what point
9 United and who from United acquired the domain name
10 United.com if it wasn't by registering it as a new
11 domain name?

12 A. I think that is important for us to
13 understand before we ask questions about the use of
14 one versus the other.

15 Me HÉLÈNE D'IORIO:

16 Yes, we will take that under advisement.

17
18 UNDERTAKING NO. 52: To indicate when and who
19 at United Airlines acquired the domain name
20 United.com [Under Advisement]

21
22 BY Me LOUIS BELIVEAU:

23 697. Q. Okay, so now I will have to ask more
24 questions to which the answer for that one have
25 been good to have first, but unfortunately since

1 you are not willing to voluntarily return I will
2 have to ask them now, and you may have to undertake
3 to answer them once you have the information for
4 this. What I would like to know is there are many
5 other choices of domain names that would or could
6 or should have been available at the time, such as
7 United Airlines.com, UAL.com, which you already
8 had, yet you chose to change from UAL to United, is
9 that correct? The branding of the company was
10 changed from UAL to United on the Internet; would
11 you agree with that statement?

12 A. I would agree that as of December 17, 1998
13 United came in possession of United.com.

14 698. Q. And would you agree that over the course
15 of the next several years United Airlines primarily
16 became known as United.com, and not UAL.com without
17 --

18 A. United's web presence was known as
19 United.com. UAL.com, however, does still exist,
20 and it results in a redirect to United.com.

21 699. Q. So my question is given that United was
22 already aware of the existence of the Untied.com
23 website, and at the time when it registered or
24 otherwise acquired United.com why did it choose the
25 United.com web presence knowing that it would be

1 confusingly similar to my client's website?

2 Me HÉLÈNE D'IORIO:

3 Mr. Beliveau, I will interrupt you there. The
4 witness has already answered that question.
5 He pointed out to you that the mark 'United'
6 had been registered a very, very long time
7 ago.

8 Me LOUIS BELIVEAU:

9 Yes, I understand. I understand that the
10 trade mark or whatever may have already been
11 registered, but I am asking a specific
12 question about the Internet site this time.
13 We are not talking about trade marks, we are
14 talking about domain names. So, UAL.com to
15 United.com there was a switch between those,
16 and the switch, prior to that switch there
17 would have been a variable low possibility of
18 confusion. In creating that switch, United
19 Airlines brought itself much closer to my
20 client's domain name, and as a result there is
21 an increased possibility of confusion, to my
22 question:

23 700. Q. Knowing this, having established that
24 United Airlines already knew about Untied.com, why
25 did United Airlines choose to move its operations

1 from the perfectly acceptable short three letter
2 UAL.com domain to United.com, which is longer and
3 had the possibility of confusion with my client's
4 site?

5
6 OBJECTION NO. 111: Knowing this, having
7 established that United Airlines already knew
8 about Untied.com, why did United Airlines
9 choose to move its operations from the
10 perfectly acceptable short three letter
11 UAL.com domain to United.com, which is longer
12 and had the possibility of confusion with my
13 client's site?

14
15 Me HÉLÈNE D'IORIO:

16 I am instructing the witness not to answer
17 that question. I gave a lot of leeway on
18 that. We are not discussing today -- you have
19 not brought a suit, as far as I know, for the
20 use of untied versus united. I have not heard
21 that. We are the ones suing your client for
22 trade mark infringement and copyright
23 infringement, so these questions are
24 irrelevant.

1 Me LOUIS BELIVEAU:

2 No, no, we did not bring a suit, perhaps we
3 should have, but the relevance is that -- the
4 relevance is that my client had a website and
5 your client chose to set up a website with a
6 confusingly similar domain name, already
7 knowing that my client had this website up;
8 therefore it begs the question of why United
9 chose to change from a non-confusing domain
10 name, UAL.com, to a confusing domain name,
11 United.com, and that is a question for Mr.
12 Wilson which I think is a very legitimate
13 question.

14 Me HÉLÈNE D'IORIO:

15 And I am objecting.

16 Me LOUIS BELIVEAU:

17 Because a lot of this confusion would have
18 been avoided if United hadn't gone out of its
19 way to make a change to bring itself closer to
20 my client's website.

21 Me HÉLÈNE D'IORIO:

22 Mr. Beliveau, I am instructing the witness not
23 to answer the question, and as you well know
24 we are not seeking to have possession of the
25 Untied.com website; so, that line of

1 questioning is totally irrelevant.

2 Me LOUIS BELIVEAU:

3 Again, I think this is a question that is very
4 relevant. You are claiming confusion and
5 passing off, and what I see here is that we
6 had a situation where a domain name was quite
7 different. Your client became closer to the
8 domain name of my client, which was pre-
9 existing. My client had the pre-existing
10 domain name, and now you're claiming confusion
11 and passing off. So the question is why:

12 would you do that, and if you are refusing to
13 answer that question I am afraid we are going
14 to be heading towards a Refusal Motion again.

15 Me HÉLÈNE D'IORIO:

16 Yes, I think so. I think we have already
17 established that many, many hours ago, so it
18 is just one more for the Motion.

19 Me LOUIS BELIVEAU:

20 I think we are. I am just afraid -- the
21 length and the cost of the Motion are probably
22 going to be the primary questions here. I
23 think is a very simple question. Your client
24 chose an identity that was confusingly similar
25 with a web presence that was already

1 previously registered by my client, and I am
2 not able to get an answer as to why this was
3 done.

4 Me HÉLÈNE D'IORIO:

5 Well, listen, you got your answer, and I think
6 you are seeing the world upside-down, frankly.
7 You have a plaintiff here who has owned the
8 United marks for a very long time, way before
9 your client registered Untied.com, so I think
10 to pretend that somehow the confusion is
11 caused by the actions of the plaintiff is
12 really disingenuous, and I would even add that
13 I do not think the Federal Court would agree
14 with your argument. But that being said, I
15 think we should leave it for the Court to
16 decide.

17 Me LOUIS BELIVEAU:

18 Yes, I think that is what we will do, but I am
19 not saying that the confusion is caused by it,
20 but I am saying it is accentuated and
21 exaggerated by the fact that your client chose
22 to take a very similar domain name, but be
23 that as it may, I think we are reaching close
24 to the end, and then we will of course be
25 following up on undertakings, and we reserve

1 the right to follow up on all the objections
2 and undertakings, as well as to put a Refusals
3 Motion, and I think that is pretty much it.
4 We will be seeking a re-examination of Mr.
5 Wilson, as you might imagine, and I think that
6 is pretty much it for today.

7
8 **.... AND FURTHER DEPONENT SAITH NOT**

9
10 *********
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This is **Exhibit "C"** to the Affidavit of Dr. Jeremy R. Cooperstock
affirmed before me on March 4, 2014

on Virtual

E. Thomassian

Signature

EVELYNE THOMASSIAN
AGENT DU GREFFE
REGISTRY OFFICER



U.S. Department
of Transportation



Air Travel Consumer Report

A Product Of The
OFFICE OF AVIATION ENFORCEMENT AND PROCEEDINGS
Aviation Consumer Protection Division

Issued: August 2011



Flight Delays¹	June 2011 12 Months Ending June 2011
Mishandled Baggage¹	June 2011 January - June 2011
Oversales¹	2 nd Quarter 2011 January - June 2011
Consumer Complaints² (Includes Disability and Discrimination Complaints)	June 2011 January - June 2011
Customer Service Reports to the Dept. of Homeland Security³	June 2011
Airline Animal Incident Reports⁴	June 2011

¹ Data collected by the Bureau of Transportation Statistics. Website: <http://www.bts.gov/>

² Data compiled by the Aviation Consumer Protection Division. Website: <http://airconsumer.dot.gov/>

³ Data provided by the Department of Homeland Security, Transportation Security Administration

⁴ Data collected by the Aviation Consumer Protection Division

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TABLE 5 (YTD)

JANUARY – JUNE
CONSUMER COMPLAINTS: RANKINGS
U.S. AIRLINES *

RANK	AIRLINE	JANUARY - JUNE 2011			JANUARY - JUNE 2010		
		COMPLAINTS	SYSTEMWIDE ENPLANEMENTS	COMPLAINTS PER 100,000 ENPLANEMENTS	COMPLAINTS	SYSTEMWIDE ENPLANEMENTS	COMPLAINTS PER 100,000 ENPLANEMENTS
1	<i>SOUTHWEST AIRLINES</i>	182	54,483,483	0.33	153	51,286,666	0.30
2	<i>ALASKA AIRLINES</i>	42	8,640,243	0.49	33	7,811,170	0.42
3	<i>MESA AIRLINES</i>	25	4,280,700	0.58	24	4,645,399	0.52
4	<i>AIRTRAN AIRWAYS</i>	77	12,204,704	0.63	146	11,944,854	1.22
5	<i>FRONTIER AIRLINES</i>	48	7,237,660	0.66	57	4,624,533	1.23
6	<i>HAWAIIAN AIRLINES</i>	31	4,241,966	0.73	39	4,074,720	0.96
7	<i>SKYWEST AIRLINES</i>	92	11,887,235	0.77	77	11,759,611	0.65
8	<i>ATLANTIC SOUTHEAST AIRLINES</i>	67	6,976,023	0.96	35	6,684,969	0.52
9	<i>EXPRESSJET AIRLINES</i>	83	8,213,543	1.01	56	7,987,574	0.70
10	<i>JETBLUE AIRWAYS</i>	136	12,660,406	1.07	160	11,549,697	1.39
11	<i>DELTA AIR LINES</i>	702	55,299,964	1.27	1,176	53,548,376	2.20
12	<i>AMERICAN AIRLINES</i>	636	42,306,297	1.50	661	42,347,093	1.56
13	<i>AMERICAN EAGLE AIRLINES</i>	138	8,249,678	1.67	68	7,793,446	0.87
14	<i>CONTINENTAL AIRLINES</i>	381	22,366,029	1.70	350	21,342,828	1.64
15	<i>US AIRWAYS</i>	456	26,302,706	1.73	428	25,366,113	1.69
16	<i>UNITED AIRLINES</i>	501	24,890,795	2.01	488	26,405,635	1.85
	TOTAL	3,597	310,241,432	1.16	3,951	299,172,684	1.32

Note: For simplicity, statistics are displayed to two decimal places. Actual ranking order is based on our computer carrying out the number of decimal places to nine.

* All U.S. airlines with at least one percent of total domestic scheduled-service passenger revenues, as determined by DOT's Bureau of Transportation Statistics, plus other carriers that report flight delay and mishandled baggage data voluntarily. The carriers that are ranked in this table are the same carriers that are ranked in the "Flight Delays" and "Mishandled Baggage" sections of this report.

NOTE: Effective January 2011, Comair and Pinnacle Airlines are no longer ranked in this table. Totals for January - June 2010 reflect the deletion of Comair and Pinnacle's data for those months.

This is **Exhibit "D"** to the Affidavit of Dr. Jeremy R. Cooperstock

affirmed before me on March 4, 2014

in Harbuck

E. Thomassian

Signature

EVELYNE THOMASSIAN
AGENT DU GREFFE
REGISTRY OFFICER



U.S. Department
of Transportation



Air Travel Consumer Report

A Product Of The
OFFICE OF AVIATION ENFORCEMENT AND PROCEEDINGS
Aviation Consumer Protection Division

Issued: August 2012



Flight Delays¹	June 2012 12 Months ending June 2012
Mishandled Baggage¹	June 2012 January – June 2012
Oversales¹	2nd Quarter 2012 January - June 2012
Consumer Complaints² (Includes Disability and Discrimination Complaints)	June 2012 January - June 2012
Customer Service Reports to the Dept. of Homeland Security³	June 2012
Airline Animal Incident Reports⁴	June 2012

¹ Data collected by the Bureau of Transportation Statistics. Website: <http://www.bts.gov/>

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Office of Aviation Enforcement and Proceedings
U.S. Department of Transportation

TABLE 5 (YTD)

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CONSUMER COMPLAINTS: RANKINGS/ U.S. AIRLINES*

RANK	AIRLINE	JANUARY-JUNE 2012			JANUARY-JUNE 2011		
		COMPLAINTS	SYSTEMWIDE ENPLANEMENTS	COMPLAINTS PER 100,000 ENPLANEMENTS	COMPLAINTS	SYSTEMWIDE ENPLANEMENTS	COMPLAINTS PER 100,000 ENPLANEMENTS
1	SOUTHWEST AIRLINES	140	55,214,373	0.25	182	54,483,483	0.33
2	MESA AIRLINES	12	3,931,536	0.31	25	4,280,700	0.58
3	ALASKA AIRLINES	42	9,027,265	0.47	42	8,640,243	0.49
4	AIRTRAN AIRWAYS	61	11,185,378	0.55	77	12,204,704	0.63
5	HAWAIIAN AIRLINES	30	4,548,689	0.66	31	4,241,966	0.73
6	JETBLUE AIRWAYS	109	14,185,321	0.77	136	12,660,406	1.07
7	DELTA AIR LINES	443	56,556,834	0.78	703	55,299,964	1.27
8	SKYWEST AIRLINES	116	12,572,961	0.92	92	11,887,235	0.77
9	FRONTIER AIRLINES	49	5,248,333	0.93	45	7,237,660	0.62
10	AMERICAN EAGLE AIRLINES	88	9,214,019	0.96	138	8,249,678	1.67
11	EXPRESSJET AIRLINES**	154	15,768,743	0.98	67	6,976,023	0.96
12	AMERICAN AIRLINES	552	43,125,140	1.28	636	42,306,297	1.50
13	VIRGIN AMERICA	46	3,032,874	1.52	*	*	*
14	US AIRWAYS	511	27,188,441	1.88	457	26,302,706	1.74
16	UNITED AIRLINES**	1,740	46,253,778	3.76	502	24,890,795	2.02
	TOTAL	4,093	317,053,685	1.29	3144	279,661,860	1.12

Note: For simplicity, statistics are displayed to two decimal places. Actual ranking order is based on our computer carrying out the number of decimal places to nine.

* All U.S. airlines with at least one percent of total domestic scheduled-service passenger revenues, as determined by DOT's Bureau of Transportation Statistics, plus other carriers that report flight delay and mishandled baggage data voluntarily. Virgin America was ranked for the first time in January 2012. The carriers that are ranked in this table are the same carriers that are ranked in the "Flight Delays" and "Mishandled Baggage" sections of this report.

** Effective January 2012, data of the merged operations of United Air Lines and Continental Airlines are combined, and appear only as United Airlines data in this table. Effective January 2012, data of the merged operations of ExpressJet Airlines and Atlantic Southeast Airlines are combined, and appear only as ExpressJet Airlines data in this table. Totals for January -June 2011 reflect the deletion of Continental's and Atlantic Southeast's data for that month.

This is **Exhibit "E"** to the Affidavit of Dr. Jeremy R. Cooperstock
affirmed before me on March 4, 2014

in Montreal

E. Thomassian

Signature

EVELYNE THOMASSIAN
AGENT DU GREFFE
REGISTRY OFFICER

This is **Exhibit "F"** to the Affidavit of Dr. Jeremy R. Cooperstock
affirmed before me on March 4, 2014

In Virtual

E. Thomassian

Signature

EVELYNE THOMASSIAN
AGENT DU GREFFE
REGISTRY OFFICER

Undertaking no.	Transcript page no.	Undertaking	Response
			<ul style="list-style-type: none"> March and April 2012
48	319	To indicate why United pulled out of the meeting with Mr. Cooperstock.	United was willing to have a meeting in order to try to address Mr. Cooperstock's infringement of United's intellectual property rights, but Mr. Cooperstock refused to address those issues and instead sought to have a meeting with numerous United representatives to discuss customer issues and his desire to be a consultant for United.
49	338	To verify if United Airlines was aware of Untied.com on the 19th of September 1997.	United was aware of Untied.com on September 19, 1997.
51	352	To indicate if United Airlines was using the domain name UAL.com in September 1997, and when the "switch" to United.com was made.	United had a website located at ual.com in 1997 but redirected the website to united.com in March 2000.

Questions Taken Under Advisement

Undertaking (taken under Advisement) no.	Transcript page no.	Question	Response
2	53	To indicate what United felt was "the problem with the trade mark" as used on the Poor Show website at the time of writing of the March 17, 1997 letter (Exhibit no. 3).	As set out in the letter, United was concerned that the use of identical or virtually identical marks by Mr. Cooperstock was likely to cause confusion and that the depiction of the marks made by Mr. Cooperstock was disparaging to United.

Undertaking (taken under Advisement) no.	Transcript page no.	Question	Response
3	54	To indicate what was "United's concern with the AltaVista search results" at the time of writing of the March 17, 1997 letter (Exhibit no. 3).	As set out in the letter, United was concerned because Mr. Cooperstock had registered the website with the AltaVista search engine and a link to the website appeared six times out of the first ninety if one typed "united airlines" in the search engine, exacerbating the likelihood of confusion and further disparaging United.
4	55	Verify whether United Airlines sued AltaVista over the search results referred to in the March 17, 1997 letter (Exhibit 3).	No such proceeding was commenced against AltaVista.
5	57	To indicate if United was satisfied with the outcome of the letter that was sent to the University of Toronto (Exhibit 3).	The removal of the Poor Show page from the University of Toronto website addressed the concerns of United but as set out in the March 17, 1997 letter, United did not "take issue with Mr. Cooperstock right to have a website in which he provides his opinion, and solicits the opinions of others, regarding United's services."
6	65	To provide the date when United first became aware of Untied.com.	United was aware of Untied.com at least as early as August 1997. An exact date cannot be ascertained.
7	66	To indicate how United became aware of the Untied.com website.	United became aware of Untied.com through internal discussions of internet users having mistyped United.com.
8	67	To verify whether Mr. Tony Molinaro was a spokesman for United Airlines in September	Mr. Molinaro was Manager Media Relations with United on September 29, 1997, and was responding in the course of his duties.

This is **Exhibit "G"** to the Affidavit of Dr. Jeremy R. Cooperstock
affirmed before me on May 21, 2014

 **MARIE-EVE LAROCHE**
AGENT DU GREFFE
REGISTRY OFFICER
Signature

C A N A D A

PROVINCE OF QUEBEC

DISTRICT OF MONTREAL

S U P E R I O R C O U R T

UNITED AIRLINES INC. and CONTINENTAL AIRLINES INC. and ELAINE

CLARK and JESSICA ROSSMAN AND JEFF WITTIG,

Plaintiffs,

- vs. -

DR. JEREMY COOPERSTOCK,

Defendant.

Extract of Hearing before the Honourable Mme.

Justice MICHELINE PERRAULT, J.C.S. on APRIL 28, 2014.

APPEARANCES :

Me MARK BANTEY

For the Plaintiffs

Dr. JEREMY COOPERSTOCK

For himself

Me KARIM RENNO

Avocat Conseil

Elizabeth Robinson, Official Court Reporter

I N D E X

PAGE

500-17-074743-124:

Extract of Hearing 3

Beginning of excerpt

***** extract of testimony of Mr. JEFF WITTIG *****

(commencing at 15:11 p.m.)

Me MARK BANTEY:

Q. ...and you refer to the fact that his website, it looks very similar to that of United, and what steps have you taken with respect to that situation?

A. We have filed a separate action in Federal Court, here in Canada.

Q. And what is the objective of that suit in Federal Court?

A. To, to, that is to address the infringement of an alleged property of United Airlines.

Q. And why was that action taken in Federal Court as opposed to Superior Court?

A. We were advised by local counsel that it was a more appropriate venue to file this in the Federal Courts.

Q. Why was it a more appropriate?

A. The Federal Courts have expertise in this particular area of the law.

Q. And what damages are you seeking in this

1 lawsuit?

2 A. We are not seeking any damages; we simply
3 want Mr. Cooperstock to take our contact information
4 off of his website.

5 Q. I have no further questions.

6
7 EXAMINATION BY Me KARIM RENNO:

8
9 Me KARIM RENNO:

10 Q. Mr. Wittig, did local counsel advise you
11 of the fact that the Superior Court of Quebec has
12 concurrent jurisdiction on trade-mark issues?

13 A. Yes, I believe I have heard that.

14 Q. You were aware that you could have filed
15 those two lawsuits in one, and brought them both
16 here?

17 A. Yes.

18 Q. Yes?

19 A. Yes.

20 Q. And yet you decided to sue Dr. Cooperstock
21 in two separate forums; one in the Federal Court, and
22 one before the Superior Court?

23 A. Yes, that was our decision, but I was not
24 part of the decision-making process related to the
25 filing of the intellectual property claim.

1 Q. And it is only accidental that that would
2 cause enormous harm to Dr. Cooperstock, defending its
3 two lawsuits except one?

4 A. That was not our intent.

5 Q. No, really? Okay. But you were aware of
6 this fact? It was a purposeful, knowledgeable
7 decision on the part of United to file two separate
8 lawsuits? You knew before you filed that you could
9 have filed only one? I just want to make that clear.

10 A. Again, I was not involved in those
11 discussions, but that is my understanding.

12 Q. That is your understanding, okay. And all
13 the parts about misleading the people who think that
14 this is a United website, and who may be misled, that
15 is all in the Federal Court action, right?

16 A. Right, the nature of -- well, two things.
17 One, the -- posting our information --

18 Q. That is here.

19 A. People -- leading people to believe that
20 that is a proper contact form is related to this
21 claim.

22 Q. No, I understand.

23 A. The fact that the logos, the trade-marks,
24 the trade dress, all are -- appear to be designed to
25 mirror the United is in the Federal Court.

1 Q. Right, that is not before this Court --

2 A. No.

3 Q. -- whether people are misled by going on
4 Untied and thinking that this is a United website?
5 That is properly in the Federal Court?

6 A. Correct, correct.

7 Q. Thank you.

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9 ***** end of excerpt *****

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C E R T I F I C A T E

I, ELIZABETH ROBINSON, Official Court
Reporter, duly sworn as such, do certify that the
foregoing is a true and faithful transcription of the
evidence herein to the best of my skill and
ability, THE WHOLE IN ACCORDANCE WITH THE LAW

AND I HAVE SIGNED:



Elizabeth Robinson

Official Court Reporter

ER/er

Court File No.: T-2084-12

FEDERAL COURT

BETWEEN:

UNITED AIRLINES, INC.

Plaintiff

– and –

DR. JEREMY COOPERSTOCK

Defendant

**WRITTEN REPRESENTATIONS OF THE MOVING PARTY, THE
DEFENDANT**

PART I – STATEMENT OF FACTS

A. Overview

1. The Plaintiff brought a lawsuit against the Defendant alleging infringement of its trade-marks and copyright and causing confusion to the public.

Amended Statement of Claim

[Tab 2]

2. The Defendant launched his website, united.com, in 1997, 20 months before the Plaintiff registered the domain name, Untied.com. The Defendant has been operating his website, Untied.com, for more than 15 years in which the Plaintiff had not brought legal actions against the Defendant.

Amended Statement of Defence, paras. 21-22

[Tab 3, P41]

Amended Statement of Defence, paras. 56-57

[Tab 3, P49]

3. The Defendant alleges that the Plaintiff's action is a SLAPP, disguised as a claim of intellectual property infringement, brought with the purpose of shutting down the Defendant's website. delay of 15 years

Amended Statement of Defence, para. 60

[Tab 3, P49]

4. The present motion is seeking to compel answers to questions posed during the examination on discovery of the Plaintiff's representative.

B. Nature of proceedings

5. On November 19, 2012, the Plaintiff commenced its action for infringement. Although the Plaintiff's main allegations are:

(a) the Defendant's activities have caused customer confusion;

- (b) the Defendant has infringed the Plaintiff's intellectual property;
and
- (c) the Plaintiff has suffered damages.

the intent of Plaintiff's action is to prevent the Defendant from operating his website.

Amended Statement of Defence, para. 63

[Tab 3, P50]

6. The Defendant filed his amended Statement of Defence on June 20, 2013, alleging that:

- (a) the Plaintiff is the maker of its own misfortune, by:
 - i. knowingly moving its operations to a domain name that had the possibility of confusion with the Defendant's domain name;
 - ii. mistreating its own passengers;
- (b) the Plaintiff delayed for 15 years commencing a legal action, and the Defendant relied upon the Plaintiff's conduct;
- (c) the Plaintiff is now attempting to revive its claim in trade-mark by framing it in copyright; and
- (d) the present action is an abuse of process.

**Amended Statement of Defence, paras. 19-24,
Amended Statement of Defence, paras. 56-64,**

**[Tab 3 P41]
[Tab 3 P49]**

C. The present motion

7. On September 17, 2013, prior to the examination for discovery of Plaintiff's witness, Plaintiff was requested to ensure that its representative had familiarized himself with all relevant issues.

Letter to Plaintiff, dated September 17, 2013
Federal Courts Rules, S.O.R./98-106

[Tab 6A]
[Tab 8]

8. An examination for discovery of the Plaintiff's representative, Mr. Scott Wilson, was conducted on October 2, 2013.

9. On discovery, the Plaintiff's representative refused to provide answers to relevant questions set out in the Refusals Chart included in the Defendant's Motion Record, on the grounds that:

- (a) the question is not relevant to any of the issues pleaded;
- (b) the information is impossible to ascertain;
- (c) the question requires a legal interpretation and/or expert opinion;
- (d) the question is vague;
- (e) the witness cannot be asked to express his position in terms of mental attitudes;
- (f) the information is subject to solicitor-client privilege;
- (g) the question is improper under the Rules; and
- (h) the question is in the nature of a fishing expedition.

Refusals Chart

[Tab 5]

10. On April 28, 2014, Mr. Jeff Wittig, testifying before the Quebec Superior Court in a parallel proceeding brought by Plaintiff against the Defendant, revealed details of the advice Plaintiff received from its legal counsel.

**Transcript of witness testimony of
Mr. Jeff Wittig, dated April 28, 2014**

[Tab 6G]

11. The present motion seeks an Order compelling the Plaintiff's representative to re-attend, at the expense of the Plaintiff, to answer the proper questions asked during the examination for discovery, on the grounds that:

- (a) the question is relevant to issues pleaded;
- (b) the information is easy to ascertain;
- (c) the question does not require a legal interpretation and/or expert opinion;
- (d) the meaning of the question was properly understood;
- (e) the witness is not asked to express his position in terms of mental attitudes but on facts;
- (f) no evidence has been provided to support solicitor-client privilege;
- (g) the Plaintiff has waived solicitor-client privilege, and
- (h) the question is proper under the Rules.

PART II – STATEMENT OF THE POINTS IN ISSUE

12. The issue to be determined in the present motion is whether the Plaintiff's representative should be compelled to reattend examination for discovery and provide answers to the questions listed in the Refusals Chart.

PART III – STATEMENT OF SUBMISSIONS

Legal Principles

13. The legal test for relevance of an item of evidence is that it must simply tend to “increase or diminish the probability of the existence of a fact in issue.”

***R. v. Arp*, [1998] 3 SCR 339**

[Tab 11]

14. This Honourable Court has held that where the information sought is technical in nature, but is within the common knowledge of the plaintiff and where the question is of a factual nature, it should be answered.

***Apotex Inc. v. Pharmascience Inc.*, 2004 FC 1198**

[Tab 12]

15. The Plaintiff’s representative has an obligation to inform himself of facts not only within his personal knowledge but also within the personal knowledge of other officers, servants or agents of the corporation. He is there to state the position of the party he represents.

***Sperry Corp. v. John Deere Ltd.*,
(1984), 82 C.P.R. (2d) 1 (Fed. T.D.)
Champion Truck Bodies Ltd. v. Canada,
[1986] 3 F.C. 245, 6 F.T.R. 63 (T.D.)**

[Tab 13]

[Tab 14]

16. A party asserting solicitor-client privilege as a basis for objecting to the production of the record must establish the privilege. Where a party’s objection to produce documents on account of solicitor-client privilege is challenged, the Court should examine the documents said to be privileged to determine whether the privilege exists.

***Williamson v. Canada (Attorney General)*,
[2003] F.C.J. No. 1425**

[Tab 15]

17. Solicitor-client privilege is waived where one party seeks to rely on legal advice it has received in order to justify a course of conduct.

Stuart Olson Construction v. Sawridge Plaza,
[1995] AJ No 953
Ermineskin First Nation v. Canada, 2011 FC 1091

[Tab 16]

[Tab 17]

18. A waiver of solicitor-client privilege as to part of a communication will be held to be waiver as to the entire communication.

Ermineskin First Nation v. Canada,
2011 FC 1091

[Tab 17]

A. Plaintiff knowingly chose to use confusing domain name

19. The Defendant alleged that the Plaintiff is the maker of its own misfortune by registering a domain name that it knew or should have known to conflict with the Defendant's.

20. The Plaintiff admitted that it was aware of the Defendant's registered domain, Untied.com, in 1997.

Transcript of Examination on Discovery of
Mr. Scott Albert Wilson, Question 682

[Tab 6B, P167]

21. The Plaintiff admitted that the domain name, United.com, was created on December 17, 1998.

Transcript of Examination on Discovery of
Mr. Scott Albert Wilson, Question 688

[Tab 6B, P168]

22. The damages allegedly suffered by the Plaintiff due to alleged customer confusion are a result of the Plaintiffs poor choice of changing its domain name.

Amended Statement of Defence, paras. 19-24

[Tab 3, P41]

23. The answer to the question in Part A, refused, can increase the probability that the Defendant is not responsible for any damages allegedly suffered by the Plaintiff.

B. Plaintiff is the maker of its own misfortune

24. The Plaintiff's conduct results in it generating the highest number of complaints per passenger flown over any other U.S. airline. This number increased substantially following the merger of Plaintiffs United Air Lines and Continental Airlines.

Amended Statement of Defence, para. 54
Examination Exhibit 27
Examination Exhibit 28

[Tab 3, P49]
[Tab 6C, P182]
[Tab 6D, P186]

25. The Defendant alleges that the Plaintiff's mistreatment of its passengers resulted in at least two widely viewed YouTube videos that depreciated the value of goodwill attaching to the Plaintiff's trade-mark.

Examination Exhibit 29

[Tab 6E]

26. Beginning in October 1998, the Defendant's website provided the ability for passengers' submitted complaints to be forwarded directly to the Plaintiff.

27. The Plaintiff admitted that it had received complaints via the Defendant's website.

Transcript of Examination on Discovery of
Mr. Scott Albert Wilson, Question 362

[Tab 6B, P131]

28. At some point after September 2000, the Plaintiff severed the communication link between the Defendant's website and the Plaintiff.

29. The answer to the questions in Section B, refused, can increase the probability that the Defendant is not responsible for any loss of goodwill attached to the Plaintiff's trade-mark and for any damages allegedly suffered by the Plaintiff.

C. Damages allegedly suffered by United – paragraph 31 of the Statement of Claim

30. The Plaintiff alleges that the Defendant's activities cause the Plaintiff to suffer considerable damages.

Amended Statement of Claim, para. 31

[Tab 2, P14]

31. The Defendant alleges that the Plaintiff has not suffered any damages caused by the Defendant, and that the Plaintiff's action constitutes an abuse of process.

Amended Statement of Defence, paras. 59-63

[Tab 3, P49]

32. The answer to the questions in Section C, refused, can demonstrate that material made available on the Internet by third parties, against whom the Plaintiff has not taken legal action, has caused the Plaintiff to suffer damages. In turn, this can increase the probability that the Plaintiff's legal action against the Defendant is an abuse of process.

D. History of Defendant's website as known to the Plaintiff

33. The appearance of the text and logo displayed on Defendant's website has evolved through several iterations between 1998 and 2012

Amended Statement of Defence, paras. 26-32

[Tab 3, P42]

34. The Plaintiff's representative readily understood similar question(s) and had no difficulty ascertaining the meaning of "what United felt" and "what was United's concern" in answering undertakings #2 and #3. Clarification was also offered as to the intended meaning of this term as part of Question #133.

**Extract of Plaintiff's Responses,
Provided November 25, 2013
Transcript of Examination on Discovery of
Mr. Scott Albert Wilson, Question 133**

[Tab 6F, P189]

[Tab 6B, P88]

35. Where questions posed in examinations on discovery are of a factual nature, they should be answered.

***P.E.I. Mutual Ins. Co. v. Insurance Co. of P.E.I.*
(1998), 80 C.P.R. (3d) 143 (Fed. Proth.)**

[Tab 9]

36. The answers to the questions in Section D, refused, can increase the probability that the Plaintiff has not taken action to protect its intellectual property, as claimed by the Plaintiff, but as an abuse of process intended to coerce the Defendant to shut down his website.

E. Failure to take legal action for 15 years

37. Throughout the entire period between 1998 and 2012, the Plaintiff did not take legal action against the Defendant.

Amended Statement of Defence, paras. 56-57

[Tab 3, P49]

38. By relying on legal advice the Plaintiff received in order to justify its course of conduct in a parallel proceeding against the Defendant, the Plaintiff has waived solicitor-client privilege with respect to its litigation strategy.

**Extract of Testimony of Mr. Jeff Wittig
provided April 28, 2014**

[Tab 6G, P194]

39. The answers to the questions in Section E, refused, can increase the probability that the Plaintiff has not taken action to protect its intellectual property, as claimed by the Plaintiff, but as an abuse of process intended to coerce the Defendant to shut down his website.

F. Defendant has taken steps to avoid confusion

40. The answers to the question in Section F, refused, can increase the probability that the Defendant's website does not create customer confusion, as claimed by the Plaintiff.

G. Plaintiff brought action in bad faith

41. The FCA held that abuse of process is a defence.

Levi Strauss & Co. v. Roadrunner Apparel Inc., [Tab 10]
1997 CanLII 5596 (FCA)

42. The answers to the questions in Section G, refused, can increase the probability that the Plaintiff has singled out the Defendant and that its decision to take legal action solely against him constitutes an abuse of process.

H. Identity and nature of testimony of non-expert witnesses

43. A person being examined for discovery shall answer any question that concerns the name or address of any person, other than an expert witness, who might reasonably be expected to have knowledge relating to a matter in question in the action.

Federal Courts Rules, S.O.R./98-106,
Rule 240 (b) [Tab 8, P215]

44. The answer to the question in Section H, refused, can help the Defendant know the case he needs to meet and prepare accordingly for trial.

I. Mootness

45. The answer to the question in Section I, refused, can increase the probability that the Plaintiff's claims will become irrelevant.

PART IV – ORDER SOUGHT

46. The Moving Party, Dr. Cooperstock, is seeking:
- (a) an Order compelling the plaintiff's witness, Mr. Scott Wilson, to re-attend, at the expense of the Plaintiff, for an examination for discovery, to answer the proper questions asked during his examination for discovery conducted on October 2, 2013, listed in the Refusals Chart **[Tab 5]**;
 - (b) an Order awarding costs of this motion to the defendant; and
 - (c) such further and other relief as this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

May 21, 2014


DR. JEREMY COOPERSTOCK
392 Grosvenor Ave.
Westmount, Québec H3Z 2M2
Tel: 438-808-6463

jcooperstock@gmail.com

Defendant / Moving Party

PART IV – LIST OF AUTHORITIES

STATUTES AND REGULATIONS	PARA. No.
<i>Federal Courts Rules</i> , S.O.R./98-106, Rules 97, 240, and 241	2
 CASES	 PARA. No.
<i>Prince Edward Island Mutual Insurance Co. v. Insurance Co. of Prince Edward Island</i> , [1998] F.C.J. No 343	35
<i>Levi Strauss & Co. v. Roadrunner Apparel Inc.</i> , 1997 CanLII 5596 (FCA)	41
<i>R. v. Arp</i> , 2004 FC 1198	13
<i>Apotex Inc. v. Pharmascience Inc.</i> , 2004 FC 1198	14
<i>Sperry Corp. v. John Deere Ltd.</i> , (1984), 82 C.P.R. (2d) 1 (Fed. T.D.)	15
<i>Champion Truck Bodies Ltd. v. Canada</i> , [1986] 3 F.C. 245, 6 F.T.R. 63 (T.D.)	15
<i>Williamson v. Canada (Attorney General)</i> , [2003] F.C.J. No. 1425	16

Federal Courts Rules S.O.R./98-106	Règles des Cours fédérales DORS/98-106
<p>Failure to attend or misconduct</p> <p>97. Where a person fails to attend an oral examination or refuses to take an oath, answer a proper question, produce a document or other material required to be produced or comply with an order made under rule 96, the Court may</p> <p>(a) order the person to attend or re-attend, as the case may be, at his or her own expense;</p> <p>(b) order the person to answer a question that was improperly objected to and any proper question arising from the answer;</p> <p>(c) strike all or part of the person's evidence, including an affidavit made by the person;</p> <p>(d) dismiss the proceeding or give judgment by default, as the case may be; or</p> <p>(e) order the person or the party on whose behalf the person is being examined to pay the costs of the examination.</p>	<p>Défaut de comparaître ou inconduite</p> <p>97. Si une personne ne se présente pas à un interrogatoire oral ou si elle refuse de prêter serment, de répondre à une question légitime, de produire un document ou un élément matériel demandés ou de se conformer à une ordonnance rendue en application de la règle 96, la Cour peut :</p> <p>a) ordonner à cette personne de subir l'interrogatoire ou un nouvel interrogatoire oral, selon le cas, à ses frais;</p> <p>b) ordonner à cette personne de répondre à toute question à l'égard de laquelle une objection a été jugée injustifiée ainsi qu'à toute question légitime découlant de sa réponse;</p> <p>c) ordonner la radiation de tout ou partie de la preuve de cette personne, y compris ses affidavits;</p> <p>d) ordonner que l'instance soit rejetée ou rendre jugement par défaut, selon le cas;</p> <p>e) ordonner que la personne ou la partie au nom de laquelle la personne est interrogée paie les frais de l'interrogatoire oral.</p>

<p>Scope of examination</p> <p>240. A person being examined for discovery shall answer, to the best of the person's knowledge, information and belief, any question that</p> <p>(a) is relevant to any unadmitted allegation of fact in a pleading filed by the party being examined or by the examining party; or</p> <p>(b) concerns the name or address of any person, other than an expert witness, who might reasonably be expected to have knowledge relating to a matter in question in the action.</p>	<p>Étendue de l'interrogatoire</p> <p>240. La personne soumise à un interrogatoire préalable répond, au mieux de sa connaissance et de sa croyance, à toute question qui :</p> <p>a) soit se rapporte à un fait allégué et non admis dans un acte de procédure déposé par la partie soumise à l'interrogatoire préalable ou par la partie qui interroge;</p> <p>b) soit concerne le nom ou l'adresse d'une personne, autre qu'un témoin expert, dont il est raisonnable de croire qu'elle a une connaissance d'une question en litige dans l'action.</p>
<p>Obligation to inform self</p> <p>241. Subject to paragraph 242(1)(d), a person who is to be examined for discovery, other than a person examined under rule 238, shall, before the examination, become informed by making inquiries of any present or former officer, servant, agent or employee of the party, including any who are outside Canada, who might be expected to have knowledge relating to any matter in question in the action.</p>	<p>L'obligation de se renseigner</p> <p>241. Sous réserve de l'alinéa 242(1)d), la personne soumise à un interrogatoire préalable, autre que celle interrogée aux termes de la règle 238, se renseigne, avant celui-ci, auprès des dirigeants, fonctionnaires, agents ou employés actuels ou antérieurs de la partie, y compris ceux qui se trouvent à l'extérieur du Canada, dont il est raisonnable de croire qu'ils pourraient détenir des renseignements au sujet de toute question en litige dans l'action.</p>

Indexed as:
**Prince Edward Island Mutual Insurance Co. v.
Insurance Co. of Prince Edward Island**

Between
Prince Edward Island Mutual Insurance Company, plaintiff and
defendant by counterclaim, and
The Insurance Company of Prince Edward Island, defendant and
plaintiff by counterclaim

[1998] F.C.J. No. 343

[1998] A.C.F. no 343

80 C.P.R. (3d) 143

78 A.C.W.S. (3d) 844

Court File No. T-733-96

Federal Court of Canada - Trial Division
Ottawa, Ontario

Morneau, Prothonotary

Heard: January 27, 1998

Judgment: March 10, 1998

(12 pp.)

*Trademarks, names and designs -- Trademarks -- Trade names - - Practice -- Examination for
discovery -- Questions related to issues between the parties -- Privileged topics or communications
-- Questions about legal issues.*

This was a motion by Insurance Co. for an order requiring answers to outstanding questions. The parties provided insurance services to the public in Prince Edward Island. Mutual alleged that the use of the name The Insurance Company of Prince Edward Island by the respondent was likely to cause confusion between the services provided by the parties and was contrary to the Trademarks

Act, and that Insurance Co. had misappropriated Mutual's goodwill and reputation. In its statement of defence, Insurance Co. pleaded that Mutual had used its current corporate name as a trade name, not as a trademark, and that its use of the name had only started in 1994. As well, it pleaded that Mutual was using a logo owned by Travelers Corporation and was therefore barred from seeking equitable relief because it could not come to court with clean hands. There were 42 questions in issue that fell within 10 general categories.

HELD: The motion was allowed in part. Questions relating to Mutual's trade name history were relevant in so far as they were limited to a reasonable time period. Questions relating to Mutual's marketing activities through a registered trade name were not relevant as Mutual was not suing on the basis of that name. Questions requiring Mutual to produce copies of contracts it had with current insurance sales agents were relevant in that they could demonstrate what instructions were given by Mutual as to how the trade names were to be used. Questions concerning the different types of insurance products offered by Mutual went to the issue of confusion under section 6(5) of the Act and should be answered. Mutual did not have to answer questions concerning litigation between Mutual and Travelers, as they were not relevant to the clean hands issue. A question requiring Mutual to come to a conclusion concerning the possibility of confusion between its logo and Travelers called for a legal determination and did not have to be answered. Questions concerning conversations carried on by two Mutual employees who might have been in house counsel had to be answered unless Mutual made a proper claim for solicitor/client privilege. The propriety of such a claim could be determined at a later date. Insurance Co. had posed some questions as to how the name Prince Edward Island Mutual Insurance Company was used outside of the province as a trade-mark. Although Mutual objected on the grounds that the question required the witness to make a legal determination, Mutual alleged in its Statement of Claim that it made use of the corporate name as a trade name and a trade-mark. Insurance Co. was entitled to discovery concerning how such uses of the name would occur. Mutual did not have to indicate what evidence it would rely on to show it had goodwill outside of Prince Edward Island as this would require disclosure of how counsel would prove Mutual's plea.

Statutes, Regulations and Rules Cited:

Trademarks Act, R.S. 1985, c. T-13, ss. 6(5), 7(b), 7(c).

Counsel:

Arthur B. Renaud, for the plaintiff and defendant by counterclaim.

R. Aaron Rubinoﬀ and Howard P. Knopf, for the defendant and plaintiff by counterclaim.

and Plaintiff by Counterclaim (the Company) directed to outstanding questions from the examination for discovery of the representative of the Plaintiff and Defendant by Counterclaim (Mutual).

2 This motion takes place in the context of a trade-names and trade-marks passing off action involving two corporations doing business in the field of insurance services to the public in the Province of Prince Edward Island, and allegedly outside that province in the case of Mutual.

3 The outstanding questions consist of forty-two (42) questions (the number of questions outstanding at the beginning of the hearing of the motion at bar) classified in ten categories.

4 I shall attempt to adjudicate on this motion by referring to each category and by avoiding where possible specific references to individual questions within each category.

5 During the hearing of the motion, counsel for the Company withdrew certain questions. Therefore, the withdrawn questions shall not be referred to herein and shall not be adjudicated.

6 Before dealing with the various categories, it is necessary to have some understanding of the background and the issues at stake.

Background and Issues

7 Mutual alleges that, since 1885, it has made use of various corporate names as trade-names and trade-marks in the provision of insurance services in the Province of Prince Edward Island as well as outside the province. Mutual alleges that it has provided these insurance services in association with a trade-name including the words "Prince Edward Island", "Mutual" and "Insurance Company" thereby establishing for Mutual a substantial reputation and goodwill in Canada

8 In support of its passing-off action under the Trade-marks Act, R.S., 1985, c. T-13, Mutual asserts the following, at paragraph 13 of its Amended Statement of Claim:

13. The Defendant has, by reason of its use of the trade-name and trade-mark THE INSURANCE COMPANY OF PRINCE EDWARD ISLAND:

- (a) directed public attention to its insurance services in such a way as to cause or be likely to cause confusion in Canada between the services of the Defendant and the services of the Plaintiff, contrary to Section 7(b) of the Trade-Marks Act;
- (b) misappropriated the goodwill and reputation connected with the Plaintiff's trade-name, contrary to Section 7(b) of the Trade-Marks Act; and
- (c) passed off its insurance services as and for the services of the

Plaintiff, contrary to Section 7(c) of the Trade-Marks Act.

(underlining omitted)

9 In defence, the Company asserts that Mutual has used and abandoned a profusion of different trade-names throughout its existence. As to Mutual's current corporate name, the Company maintains that if that name was used at all, it would have been as a trade-name, not as a trade-mark. Furthermore, the use by Mutual of its current name would have started only in 1994 -- when Mutual was granted its present name by the legislature of the Province of Prince Edward Island -- and would have been restricted to that province.

10 The Company further contends that Mutual would have adopted an umbrella design said to be similar to that of a trade-mark owned by a U.S. corporation, Travelers Corporation. Accordingly, Mutual would come to this Court seeking equitable relief with a lack of clean hands.

11 In answer to Mutual's allegation that certain aspects of the Company's business are in direct competition with Mutual's business, the Company replies that Mutual benefits from certain favourable tax treatment not available to the Company and that Mutual does not offer automobile insurance which is one of the Company's main products and services.

12 The Company also attacks the vires of section 7 of the Trade-marks Act or, alternatively, the jurisdiction of this Court to grant Mutual any relief in respect thereof on the assumption that the dispute between the parties involves solely corporate or trade-names and not trade-marks.

The Law on Questions on Discovery

13 As stated by MacKay J. in *Sydney Steel Corp. v. Omisalj (The)*, (1992) 2 F.C. 193, at page 197:

(...) [T]he standard for propriety of a question asked in discovery (...) is whether the information solicited by a question may be relevant to the matters which at the discovery stage are in issue on the basis of pleadings filed by the parties.

14 Despite this broad statement of principle, though, there are some limits on the ambit of an examination for discovery, one of which is that far-reaching questions in the nature of a fishing expedition are to be discouraged (see *Reading & Bates Construction Co. v. Baker Energy Resources Corp.* (1988), 24 C.P.R. (3d) 66 (F.C.T.D.), at page 72).

15 With this in mind, I shall now evaluate the propriety of the questions and documents requested.

Category 1

16 This category deals with Mutual's corporate and trade-name history. Considering that Mutual

changed name several times in the past, that history might have been relevant had it been limited to a reasonable time period. However, the questions request information covering the period since 1885. This information would not be relevant to any material date alleged by the parties in these pleadings. In addition, I am of the view that any probative value which the information sought may offer is by far outweighed by the time and trouble it would take to provide answers. Therefore, no questions need to be answered in category 1.

Category 2

17 Some questions under this category intend to probe Mutual's marketing activities through a registered trade-name referred to as PEI Direct. However, it must be noted that Mutual is not suing on the basis of that name. In addition, it would appear that the use of that trade-name by Mutual is prospective only. Therefore, I conclude that questions 137, 250, 251 and 252 are hypothetical in nature and irrelevant to the issues in dispute. They will not be ordered answered.

18 Question 234 requires Mutual to produce copies of contracts it might have with each of its current insurance sales agents. It is argued that this question is put to discover what instructions might be given by Mutual with respect to how its different trade-names are to be used. I believe that this is an appropriate avenue of inquiry. Therefore, question 234 must be answered.

Category 3

19 This category addresses Mutual's financial statements. The only question remaining under this category is question 577. The Court shall take note of counsel for Mutual's undertaking to answer it should the material submitted with respect to question 68 prove to be insufficient to answer question 577 as well.

Category 4

20 This category deals with the nature of the different types of insurance products offered by Mutual and the impact of the tax benefit enjoyed by Mutual on these products.

21 I agree with counsel for the Company that these issues may be relevant to listed surrounding circumstances in an analysis of confusion under subsection 6(5) of the Act. Therefore all questions under this category shall be answered.

Category 5

22 The issue emphasized in this category is Mutual's alleged use of a third party umbrella logo, namely the Travelers Corporation's logo. It relates to two paragraphs found in the Company's Amended Defence and Counterclaim. I do not believe that the Company should be allowed to pursue questions 947 and 948 even though, by an order of even date, I denied a motion by Mutual to have these two paragraphs struck out. These questions purport to discover whether Mutual and

Travelers sued one another over the use of the similar umbrella logos. The answers to these questions are irrelevant to the issues in dispute between Mutual and the Company. Questions 947 and 948 need not be answered.

23 Question 950 requests Mutual to come to a conclusion as to the possibility of confusion arising between Travelers' and Mutual's umbrella logos. This question calls for a legal determination which is within the purview of the Court, not of Mutual's representative. This question need not be answered.

Category 6

24 This category addresses Mutual's 1994 change of name. The questions asked refer to discussions or communications held by two employees of Mutual further to a letter from the Office of the Superintendent of Insurance for the Province of Prince Edward Island. I understand, though, that these employees would be in-house lawyers for Mutual. Counsel for Mutual is concerned with the possibility of a solicitor-client privilege since the discussions or communications referred to might very well have been carried on by the two employees in their capacity as lawyers.

25 The questions asked appear to be relevant to the issues raised in paragraph 15 of Mutual's Amended Statement of Claim and in paragraph 20 of the Company's Amended Statement of Defence and Counterclaim. However, so far the basis for asserting that privilege has not been clearly established.

26 Therefore, Mutual shall answer the questions in this category unless a proper claim for solicitor-client privilege is made by Mutual, the propriety of which shall be determined at a later date.

Category 7

27 With respect to the only question under this category, the Court takes note that Mutual has provided an answer or will be providing one in writing.

Category 8

28 All questions in this category were withdrawn. No adjudication is therefore needed.

Category 9

29 All questions under this category, save question 109, pertain to the constitutional and jurisdictional issues raised by the Company in its Defence. They are all framed alike. For example, question 42 reads as follows:

Provide examples of how the name "Prince Edward Island Mutual Insurance Company" is used outside of Prince Edward Island as a trade-mark.

30 Mutual objects to answering these questions on the basis that they ask the witness to make a legal determination of what a "trade-mark" or a "trade-name" is. It is submitted that these are questions of law and are therefore improper.

31 However, it is Mutual which raises in its Amended Statement of Claim that it makes use of its corporate name as a trade-name and trade-mark. Therefore, the Company is entitled to discover how in fact such would be the case. Even though question 42 might require an expression of opinion by the witness as it contains a qualifier at the end, I am of the view that question 42 and the questions framed alike are essentially geared to discover facts. In *Foseco Trading A.G. v. Canadian Ferro Hot Metal Specialties, Ltd.* (1991), 36 C.P.R. (3d) 35, Madame Justice Reed had to evaluate the propriety of a question where the information sought was factual as well as technical in nature, not factual as well as legal in nature as in our present case. Nevertheless, I believe that the principle she found to be applicable there (page 52) can be applied here:

I have not been able to find, however, an articulation of the appropriate principle, in a case such as the present, where the information sought is technical in nature (and for that reason might be addressed in an affidavit of an expert witness), but is within the common knowledge of the plaintiff and where the question is of a factual nature although it can arguably be said to require an expression of opinion by the witness, in the sense that many assertions of "fact" require the expression of an "opinion". It is my conclusion that in such cases the principle to be applied is that the factual nature of the question takes precedence and the question should be answered.

32 Therefore, questions 36, 42, 44, 48 and 49 shall be answered.

33 Question 109 reads as follows:

Advise what evidence the Plaintiff has to rely on to show that the Plaintiff has goodwill outside of Prince Edward Island.

34 I agree with Mutual's counsel that this question asks the witness to choose facts and to disclose how his lawyer will prove his plea. Consequently, it amounts to an improper question and need not be answered.

Category 10

35 All questions under this category were withdrawn. Therefore, no adjudication is required.

36 An order will issue ordering Mutual to answer, in writing as requested by counsel for both parties, within fifteen (15) days from the date of the order, all the questions for which an answer is required according to the above reasons.

37 The order will also require Blair Campbell, the representative of the Plaintiff and Defendant by Counterclaim previously examined for discovery, to re-attend, at the expense of the Plaintiff and Defendant by Counterclaim, upon a date, time and place to be agreed by counsel or, failing such agreement, on a date, time and place fixed by a direction to attend served by the Defendant and Plaintiff by Counterclaim, to answer all proper questions arising from the answers and documents provided under paragraph 36 above.

38 As success is divided on this motion, costs will be in the cause.

MORNEAU, PROTHONOTARY

cp/d/mwk/DRS

Levi Strauss & Co. v. Roadrunner Apparel Inc., 1997 CanLII 5596 (FCA)

Date: 1997-10-27
Docket: A-240-97
Parallel 76 CPR (3d) 129
citations:
URL: <http://canlii.ca/t/4n04>
Citation: Levi Strauss & Co. v. Roadrunner Apparel Inc., 1997 CanLII 5596 (FCA),
<<http://canlii.ca/t/4n04>> retrieved on 2014-02-19
Noteup: Search for decisions citing this decision
Reflex Related decisions, legislation cited and decisions cited
Record

A-240-97

CORAM: STRAYER J.A.
DESJARDINS J.A.
LÉTOURNEAU J.A.

BETWEEN:

LEVI STRAUSS & CO. and
LEVI STRAUSS & CO. (CANADA) INC.

Appellants
(Plaintiffs)

AND:

ROADRUNNER APPAREL INC.

Respondent
(Defendant)

REASONS FOR JUDGMENT

This is an appeal by Levi Strauss & Co. and Levi Strauss & Co. (Canada) Inc. from the order of a motions judge, dated March 6, 1997, not to strike out paragraphs 18 and 21 of the Statement of Defence of the Respondent (Roadrunner Apparel Inc.) pursuant to Rule 419(1) of the Federal Court Rules.

The paragraphs relate to the Appellants' trade-mark rights in Canada to use a double arcuate design applied to the hip pocket of jeans-type garments. They read:

18. The Plaintiffs have acquiesced in and condoned the use of double arcuate designs applied to the rear pockets of jeans or similar garments by others in Canada or, in the alternative, the Plaintiffs have failed to diligently enforce their alleged rights in the alleged trade-mark against others.

21. The Defendant states that the Plaintiffs' action is frivolous and vexatious and intended only to try to harass and intimidate the Defendant. The Plaintiffs have threatened numerous jeans manufacturers and/or vendors, some of whom are outlined in Schedule "A" with legal action and have in fact commenced action against some manufacturers/vendors of jeans in Canada, for allegedly infringing registration number UCA39879. However, the Plaintiffs have failed to diligently pursue and prosecute those actions and have avoided the final adjudication of their alleged rights. By this course of action, the Plaintiffs attempt to interfere with said jeans manufacturers/vendors' business and maintain the Plaintiffs' market share.

a) Paragraph 18 and the defence of acquiescence

The Appellants argue in relation to the allegation of acquiescence found in paragraph 18 that the defence of acquiescence is personal to a defendant and, consequently, that a defendant cannot rely on a plaintiff's acquiescence to the use of its trade-mark by third parties. The contention is that the behaviour of a plaintiff toward other parties is irrelevant to the determination of an issue between the plaintiff and a specific defendant who does not claim acquiescence in relation to itself. In support of their position, the Appellants have referred us to American authorities, but to no Canadian precedents in the matter.

It is not necessary for us to decide the point as submitted and argued by the Appellants. I am satisfied that paragraph 18 ought to be read as a whole with paragraphs 16 and 17 of the Statement of Defence which specifically allege that the double design applied to the rear pockets of jeans has lost the distinctiveness claimed by the Appellants because it has been widely used in the past by a number of companies and still is in common use in Canada¹. It is, in my view, in this context of loss of distinctiveness that the Respondent's reference to acquiescence by the Appellants to the use of its trade-mark in the market place ought to be read and understood. The owner of a trade-mark may by his personal conduct or own behaviour, including acquiescence to the use of the trade-mark by others, irremediably compromise the distinctiveness of the mark and the validity of the registration². Consequently, it is quite proper for a defendant in an infringement lawsuit to allege such fact in its Statement of Defence provided it is supported by a factual base. The motions judge properly found that the Respondent had provided statements of fact supporting its allegation and I see no reason to intervene in the exercise of his discretion not to strike the part of paragraph 18 which refers

to acquiescence.

b) Paragraph 21 and the allegation that the Appellant's lawsuit is frivolous and vexatious

Paragraph 18 contains an alternative pleading which alleges that "the Plaintiffs have failed to diligently enforce their alleged rights in the alleged trade-mark against others". It is a re-statement in part of paragraph 21 and ought to be assessed with it.

The Appellants submit that the Respondent questions in paragraphs 18 and 21 the motive for bringing the lawsuit and that motive does not constitute at law a defence. They further submit that these allegations are immaterial and irrelevant and would prejudice and delay the fair trial of the action.

For its part, the Respondent basically submitted to us that what it alleges in its Statement of Defence is that the Appellants, under the guise of a valid enforcement of their trade-mark, are in fact abusing the process of the Court. The Respondent wants to establish that the abuse of process resides in the Appellants' action or course of conduct which is designed to harrass him and other users of the trade-mark and also to avoid by all means a determination of the validity of their registration.

I think that the validity of paragraph 21 and the relevant portion of paragraph 18 stands to be decided on the principles applicable to an abuse of process of the Court and that, in this context, motive is highly relevant.

The concept of abuse of process has developed both in substantive and procedural law. It is well settled law, from the point of view of substantive law, that an abuse of process is an actionable tort. As Henry J. stated in *Tsiopoulous v. Commercial Union Assurance Co.*³ when dealing with a counterclaim for damages for abuse of process:

"This cause of action arises when the processes of law are used for an ulterior or collateral purpose. It is defined as the misusing of the process of the courts to coerce someone in some way entirely outside the ambit of the legal claim upon which the court is asked to adjudicate. It occurs when the process of the court is used for an improper purpose and where there is a definite act or threat in furtherance of such purpose."

In Fleming's *The Law of Torts*⁴, the learned author distinguishes between certain forms of abuse of legal procedure such as malicious arrest and execution and the concept of abuse of process:

"Quite distinct, however, are cases where a legal process, not itself devoid of foundation, has been perverted for some extraneous purpose, such as extortion or oppression. Here an action will lie at the suit of the injured party for what has come to be called "abuse of process"."

A review of the authorities shows that the essential element of the tort of abuse of process is that the abuser must have used the legal process for a purpose other than that which it was designed to serve, in other words for a collateral, extraneous, ulterior, improper or illicit purpose⁵. The gist of the tort is the misuse or perversion of the Court's process and there is no

abuse when a litigant employs regular legal process to its proper conclusion, even with bad intentions⁶.

Abuse of process has also been invoked as a procedural defence, especially in criminal law when the proceedings were oppressive or vexatious or offensive to the principles of fundamental justice and fair play⁷. When successful, the defence has resulted in a stay of the proceedings.

However, the procedural defence of abuse of process knows of no legal barrier in the sense that its application is not limited to the field of criminal law, but extends to other fields such as civil, constitutional or administrative law⁸. There is nothing to prevent its application to an infringement lawsuit. The abuse of process notion proceeds from a rationale unconnected with the various segments of the law in which it can be invoked. It is a request to a Court to vindicate its process and protect it from abuse by litigants and I, for one, would be very loath to deny a litigant the right to raise the issue in its Statement of Defence and seek our protection against such an abuse when there is a factual basis to support the claim.

Again, I think the motions judge properly exercised his discretion when he came to the conclusion that there was a supporting factual basis for the allegation made by the Respondent and refused to strike paragraph 21 and the relevant portion of paragraph 18.

Finally, I wish to add that the difficulties for a defendant of proving a misuse or perversion of the process on the part of a plaintiff seeking to enforce its trade-mark through the legal process cannot be underestimated. However, this is not a valid ground for denying a defendant such possibility.

For these reasons, the appeal should be dismissed with costs here and below.

"Gilles Létourneau"

J.A.

"I agree

B.L. Strayer J.A."

"I concur,

Alice Desjardins

J.A."

A-240-97

CORAM: STRAYER J.A.

DESJARDINS J.A.

LÉTOURNEAU J.A.

BETWEEN:

LEVI STRAUSS & CO. and

LEVI STRAUSS & CO. (CANADA) INC.

Appellants

(Plaintiffs)

AND:

ROADRUNNER APPAREL INC.

Respondent

(Defendant)

Heard at Ottawa, Wednesday, October 15, 1997

Judgment rendered at Ottawa, Monday, October 27, 1997

REASONS FOR JUDGMENT BY: **LÉTOURNEAU J.A.**

CONCURRED IN BY: **STRAYER J.A.**

DESJARDINS J.A.

¹ Paragraphs 16 and 17 read: 16. A double arcuate stitching design applied to the rear pockets of jeans or similar garments was not, at the time these proceedings were commenced, and is not at the present time, distinctive of the Plaintiffs or either of them. At the time these proceedings were commenced and at the present time, a double arcuate design applied to the rear pockets of jeans or similar garments were used by a number of companies and was used in the past and was in common use in Canada. Brands of jeans which have been offered for sale in Canada or are presently offered for sale in Canada having such a design are listed at Schedule "A" to the Statement of Claim. The identity of other manufacturers and sellers of jeans in Canada who also apply double arcuate design to the rear pockets of their jeans or similar garments is currently unknown to the Defendant. As a result of such use and/or registration, the Plaintiffs' trademark is not distinctive and the registration is therefore invalid and the Defendant pleads and relies upon Section 18(1)(b) of the Trademarks Act. 17. A double arcuate design has been and currently continues to be commonly applied to the rear pockets of jeans or similar garments for the purposes of ornament or decoration and therefore is not adapted to distinguish the wares of the Plaintiffs from those of others. The Defendant therefore states that a double arcuate design is not a trademark within the meaning of Section 2 of the Trademarks Act, [R.S.C. 1985 c. T. 13](#), as amended.

² *Hughes on Trade Marks*, (Toronto: Butterworths, March 1997) at para. 32, p. 459: "The owner of a trade mark may lose his exclusive rights if he permits the widespread use of it by rival trades, either by conscious or negative action... The more often a mark is used by third parties, the less the protection affords. Distinctiveness can be lost where a trade mark owner permits use by third parties". See also D. Vaver, *Intellectual Property Law*, (Toronto: Carswell, 1997) at p. 228.

³ [1986 CanLII 2531 \(ON SC\)](#), (1986) 32 D.L.R. (4th) 614, at 616 (O.H.C.). See also *Guilford Industries Ltd. v. Hankinson Management Services Ltd. et al.*, (1973) 40 D.L.R. (3d) 398 (B.C.S.C.); *Atland Containers Ltd. v. Macs Corp Ltd. et al.*, [1974 CanLII 864 \(ON SC\)](#), (1974) 7 O.R. (2d) 107, 54 D.L.R. (3d) 363 (O.H.C.); *Unterreiner v. Wilson et al.*, [reflex](#), (1982) 142 D.L.R. (3d) 588, affirmed [1983 CanLII 1968 \(ON CA\)](#), (1983) 146 D.L.R. (3d) 322 (Ont. C.A.).

⁴ 4th ed. (1971), pp. 547 and 548.

⁵ *Grainger v. Hill*, (1838) 132 E.R. 769; *D.K. Investments Ltd. v. S.W.S. Investments Ltd.*, [1984 CanLII 398 \(BC SC\)](#), (1984) 59 B.C.L.R. 333 (S.C.), affirmed [1986 CanLII 920 \(BC CA\)](#), (1986) 6 B.C.L.R. (2d) 291 (C.A.); *Hedley v. Air Canada*, (1994) 23 C.P.C. (3d) 352 (Ont. Gen. Div.); *Canada Metal Col. v. Heap*, [1975 CanLII 675 \(ON CA\)](#), (1975) 7 O.R. (2d) 185 (C.A.); *Norman v. Soule et al.*, (1990) 7 C.C.L.T. (2d) 16 (B.C.S.C.); *R. Cholkani & Co. v. Brinker*, [1990 CanLII 6865 \(ON SC\)](#), (1990) 71 O.R. (2d) 381 (H.C.). See also L. Klar, *Tort Law*, 1st ed. (Toronto: Carswell, 1991), pp. 50-51; G. Fridman, *The Law of Torts in Canada*, Vol. 2 (1990), pp. 250-251; G. Fridman, *Fridman on Torts*, (1990) pp. 587-589; Solomon & Feldthusen, *Cases and Materials on the Law of Torts*, 3rd ed. (1991), p. 70; J. Irvine, *The Resurrection of Tortious Abuse of Process*, (1989), 47 *C.C.L.T.* 217.

⁶ *Grainger v. Hill*, *supra*.

⁷ *R. v. Curragh Inc.*, [1997 CanLII 381 \(SCC\)](#), [1997] 1 S.C.R. 537; *R. v. O'Connor*, [1995 CanLII 51 \(SCC\)](#), [1995] 4 S.C.R. 411; *R. v. Keyowski* [1988 CanLII 74 \(SCC\)](#), [1988] 1 S.C.R. 657; *R. v. Power*, [1994 CanLII 126 \(SCC\)](#), [1994] 1 S.C.R. 601.

⁸ See for example *General Food Ltd. v. Struthers Scientific & International Corp.*, [1971 CanLII 189 \(SCC\)](#), [1974] S.C.R. 98 where Pigeon J. said that patent owners and their attorneys are expected to avoid unnecessary costs and that the unreasonable multiplication of proceedings is an abuse of the worst kind; *Borley v. Fraser River Harbour Commission*, [reflex](#), (1995) 92 F.T.R. 275 (F.C.T.D.) where an action was struck out as an abuse of process where it sought to raise issues that had been or could have been litigated in proceedings that had been finally determined in the Superior Court of the Province; *Kastner v. Painblanc* (1994), 176 N.R. 68 (Fed. C.A.) where it is an abuse of the Court's process for a plaintiff to start proceedings in the hope that something will turn up; *Oak Bay Marine Group v. Jackson*, [1994 CanLII 3474 \(FC\)](#), [1994] 3 F.C. 177 (T.D.) where an action which arose out of the same facts as an action instituted four years earlier involving repetitious evidence and argument from the earlier case was struck out as an abuse of process; *Musqueam Indian Band v. Canada (Min. of Indian & Northern Affairs)*, [reflex](#), [1990] 2 F.C. 351 (T.D.) where it is an abuse of process to relitigate an issue based on facts which were decided on by the

Supreme Court of Canada; *Favor v. Winnipeg (City)*, [reflex](#), [1989] 3 W.W.R. 374 (C.A.) where the plaintiff's action was dismissed as an abuse of process since the validity of the expropriation had already been decided in an earlier proceeding); *Crown Trust Co. v. Rosenberg* (1983), 38 C.P.C. 109 (Ont. H.C.) where a request for information [on an examination carried out pursuant to a subpoena to be used on a motion] was an abuse of process; *Brand v. College of Physicians and Surgeons (Saskatchewan)*, [reflex](#), [1989] 5 W.W.R. 516 (Q.B.) where a delay in the institution of proceedings may constitute an abuse of process.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO.: A-240-97

APPEAL FROM AN ORDER OF THE TRIAL DIVISION DATED MARCH 6, 1997 IN T-2529-96.

STYLE OF CAUSE:

Levi Strauss & Co. et al. v.

Roadrunner Apparel Inc.

PLACE OF HEARING:

Ottawa, Ontario

DATE OF HEARING:

Wednesday, October 15, 1997

REASONS FOR JUDGMENT BY:

Létourneau J. A.

CONCURRED IN BY:

Strayer J. A.

Desjardins J.A.

DATED:

Monday, October 27, 1997

APPEARANCES:

Mr. David A. Morrow

Ms. Catherine Eckenswiller

for the Appellants

Mr. Glenn Sheskay

for the Respondent

SOLICITORS OF RECORD:

Smart & Biggar

Ottawa, Ontario

for the Appellants

Yegendorf, Brazeau, Seller

Ottawa, Ontario

for the Respondent

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by **LEXUM**  for the  Federation of Law Societies of Canada

Brian Arp *Appellant*

v.

Her Majesty The Queen *Respondent*

and

**The Attorney General of Canada, the
Attorney General for Ontario and the
Attorney General for Alberta** *Interveners*INDEXED AS: **R. v. ARP**

File No.: 26100.

1998: June 18; 1998: November 26.

Present: Lamer C.J. and L'Heureux-Dubé, Gonthier,
Cory, McLachlin, Iacobucci, Major, Bastarache and
Binnie JJ.ON APPEAL FROM THE COURT OF APPEAL FOR
BRITISH COLUMBIA*Constitutional law — Charter of Rights — Funda-
mental justice — Presumption of innocence — Standard
of proof to be applied to conclusions drawn from similar
fact evidence — Whether application of civil standard
would offend Charter principles of fundamental justice
and right to be presumed innocent — Canadian Charter
of Rights and Freedoms, ss. 7, 11(d).**Criminal law — Evidence — Similar fact evidence —
Standard of proof to be applied to conclusions drawn
from similar fact evidence — Whether application of
civil standard would offend Charter principles of funda-
mental justice and right to be presumed innocent —
Canadian Charter of Rights and Freedoms, ss. 7, 11(d).**Constitutional Law — Charter of Rights — Unreason-
able search and seizure — Body samples given with con-
sent during investigation of earlier crime — Samples
seized under warrant and analysed with respect to
investigation of second crime — Whether admission of
bodily samples offended right to be free from unreasona-
ble search and seizure guaranteed in ss. 7 and 8 of the
Charter — Canadian Charter of Rights and Freedoms,
ss. 7, 8.***Brian Arp** *Appellant*

c.

Sa Majesté la Reine *Intimée*

et

**Le procureur général du Canada, le
procureur général de l'Ontario et le
procureur général de l'Alberta** *Intervenants*RÉPERTORIÉ: **R. c. ARP**

N° du greffe: 26100.

1998: 18 juin; 1998: 26 novembre.

Présents: Le juge en chef Lamer et les juges L'Heureux-
Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major,
Bastarache et Binnie.EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-
BRITANNIQUE*Droit constitutionnel — Charte des droits — Justice
fondamentale — Présomption d'innocence — Norme de
preuve applicable aux conclusions tirées d'une preuve
de faits similaires — L'application de la norme civile
porterait-elle atteinte aux principes de justice fonda-
mentale et au droit à la présomption d'innocence garan-
tis par la Charte? — Charte canadienne des droits et
libertés, art. 7, 11d).**Droit criminel — Preuve — Preuve de faits similaires
— Norme de preuve applicable aux conclusions tirées
d'une preuve de faits similaires — L'application de la
norme civile porterait-elle atteinte aux principes de jus-
tice fondamentale et au droit à la présomption d'inno-
cence garantis par la Charte? — Charte canadienne des
droits et libertés, art. 7, 11d).**Droit constitutionnel — Charte des droits — Fouilles,
perquisitions et saisies abusives — Échantillons de
substances corporelles obtenus avec le consentement de
l'intéressé dans le cours d'une enquête sur un premier
crime — Échantillons saisis en vertu d'un mandat et
analysés dans le cadre d'une enquête sur un second
crime — L'admission en preuve des échantillons de
substances corporelles a-t-elle porté atteinte au droit à
la protection contre les fouilles, les perquisitions et les
saisies abusives garanti par les art. 7 et 8 de la Charte
— Charte canadienne des droits et libertés, art. 7, 8.*

Two women were murdered some two-and-a-half years apart in the same city and in similar circumstances.

The accused was arrested after the first murder. He gave the investigating officers scalp and pubic hair samples when asked if he was interested in helping them eliminate him as a suspect. The samples were to be used to determine whether any of his hair was found where the victim was found and he was released when none matched the samples taken from the victim's coat. (Use for DNA analysis was not contemplated at the time.) The officer advised him that any evidence gathered as a result of the hair sample would be used in court.

During the investigation of the second murder, the accused refused to provide samples for DNA testing. Cigarette butts belonging to him, however, were taken after his police interview, analysed as to DNA composition and found to match the semen fraction taken from the second victim. The scalp and pubic hairs taken from the accused during the first murder investigation were analysed as to DNA composition and found to match the analysis of the cigarette butts and the semen. The accused was arrested and charged with the first degree murder of the second victim and then re-arrested and charged with the first degree murder of the first victim as well.

Defence counsel twice unsuccessfully applied to sever the two murder counts in the indictment, before the trial and at the end of a lengthy *voir dire*. Counsel also objected to the admissibility of the samples taken and used by the police for DNA analysis and the DNA evidence itself. The evidence was ruled admissible. A jury convicted the accused on both counts. His appeal to the Court of Appeal was dismissed.

Two principal issues arose here. First, whether a jury, to draw conclusions from similar fact evidence, was to be satisfied on a civil or criminal standard of proof that the same person committed the acts in question, and if the civil standard applied, whether the principles of fundamental justice (s. 7) and the right to be presumed innocent (s. 11(d)) in the *Canadian Charter of Rights*

Deux femmes ont été assassinées à deux ans et demi d'intervalle dans la même ville et dans des circonstances similaires.

L'accusé a été arrêté après le premier meurtre. Il a fourni des échantillons de cheveux et de poils pubiens aux policiers chargés de l'enquête, qui lui avaient demandé s'il était intéressé à les aider à l'éliminer comme suspect. Les échantillons devaient servir à déterminer si des cheveux ou des poils lui appartenant avaient été trouvés à l'endroit où la victime avait été découverte. L'accusé a été libéré étant donné qu'aucun échantillon ne correspondait à ceux prélevés sur le manteau de la victime. (L'utilisation des échantillons pour fins d'analyse génétique n'avait pas été envisagée à ce moment-là.) Un policier a avisé l'accusé que si ces échantillons permettaient de recueillir quelque élément de preuve, cet élément serait utilisé devant les tribunaux.

Dans le cadre de l'enquête menée sur le second meurtre, l'accusé a refusé de fournir des échantillons de substances corporelles pour fins d'analyse génétique. Toutefois, des mégots de cigarettes fumées par l'accusé ont été ramassés après l'interrogatoire policier et soumis à des analyses génétiques. On a constaté une concordance entre ces mégots et le sperme prélevé sur la seconde victime. Les cheveux et les poils pubiens fournis par l'accusé au cours de l'enquête sur le premier meurtre ont été utilisés pour des analyses génétiques et une concordance a été constatée entre ces échantillons et les mégots de cigarette et le sperme. L'appelant a été arrêté et inculpé du meurtre au premier degré de la seconde victime, puis il a à nouveau été arrêté à l'égard du meurtre de la première victime et inculpé de meurtre au premier degré.

L'avocat de la défense a vainement demandé à deux reprises — avant le procès ainsi qu'à la fin d'un long *voir-dire* — que les deux chefs d'accusation de meurtre contenus dans l'acte d'accusation soient séparés. L'avocat a également contesté l'admissibilité des échantillons prélevés et utilisés par les policiers pour les analyses génétiques ainsi que l'admissibilité de la preuve génétique elle-même. La preuve a été déclarée admissible. Un jury a reconnu l'accusé coupable des deux chefs d'accusation. L'appel formé par ce dernier devant la Cour d'appel a été rejeté.

La présente affaire soulevait deux questions principales. Premièrement, pour tirer des conclusions fondées sur une preuve de faits similaires, le jury doit-il être convaincu que la même personne a commis les actes en question selon la norme de preuve applicable en matière civile ou selon celle applicable en matière criminelle, et si la norme civile s'appliquait, y aurait-il atteinte aux

and Freedoms would be offended. Second, did the admission into evidence of hair samples obtained by consent for one police investigation and used in connection with the separate later investigation offend the accused's right to be free from unreasonable search and seizure guaranteed in ss. 7 and 8 of the *Charter*?

Held: The appeal should be dismissed.

In considering whether similar fact evidence should be admitted the basic question to be determined is whether the probative value outweighs the prejudicial effect. Therefore, in cases where identity is at issue and the accused is shown to have committed acts with a striking similarity to the alleged crime the jury is not asked to infer from the accused's habits or disposition that he or she is the type of person who would commit the crime. Instead the jury is asked to infer from the distinctiveness or uniqueness that exists between the manner in which the crime under consideration was committed and the similar act that the accused is the very person who committed the crime. This inference is made possible only if the high degree of similarity between the acts renders the likelihood of coincidence objectively improbable. Once this preliminary determination is made, the evidence related to similar fact (or count, in a multi-count indictment) may be admitted to prove the commission of another act (or count).

Several suggestions were put forward to assist judges in their approach to similar fact evidence. Where similar fact evidence is adduced to prove identity, a high degree of similarity between the acts is required since in order to be admissible the similar fact evidence must have the requisite probative value necessary to outweigh its prejudicial effect. The similarity between the acts may consist of a unique trademark or signature on a series of significant similarities. In assessing the similarity of the acts, the trial judge should only consider the manner in which the acts were committed and not the evidence as to the accused's involvement in each act. There may well be exceptions but as a general rule, if upon assessing the similarity of the acts in this manner, the trial judge is satisfied that there is such a degree of similarity between the acts that they were likely committed by the same person, the similar fact evidence will ordinarily have sufficient probative force to outweigh its prejudicial effect and may be admitted. The jury will then be

principes de justice fondamentale (art. 7) et au droit à la présomption d'innocence (al. 11d)) garantis par la *Charte canadienne des droits et libertés*? Deuxièmement, l'admission en preuve d'échantillons de cheveux et de poils obtenus avec le consentement de l'intéressé au cours d'une enquête policière puis utilisés dans le cadre d'une enquête distincte a-t-elle porté atteinte au droit de l'accusé d'être protégé contre les fouilles, les perquisitions et les saisies abusives garanti par les art. 7 et 8 de la *Charte*?

Arrêt: Le pourvoi est rejeté.

Pour décider si une preuve de faits similaires doit être déclarée admissible, la question fondamentale qui doit être tranchée est de savoir si la valeur probante de cette preuve l'emporte sur son effet préjudiciable. Par conséquent, lorsque l'identité est un point litigieux dans une affaire et qu'il est démontré que l'accusé a commis des actes présentant des similitudes frappantes avec le crime reproché, le jury n'est pas invité à inférer des habitudes ou de la disposition de l'accusé qu'il est le genre de personne qui commettrait ce crime. Au contraire, le jury est plutôt invité à inférer du degré de particularité ou de singularité qui existe entre le crime perpétré et l'acte similaire que l'accusé est la personne même qui a commis le crime. Cette inférence n'est possible que si le haut degré de similitude entre les actes rend une coïncidence objectivement improbable. Une fois cette constatation préliminaire faite, les éléments de preuve relatifs aux faits similaires (ou au chef d'accusation, dans un acte d'accusation comportant plusieurs chefs) peuvent être admis pour prouver la perpétration d'un autre acte (ou chef d'accusation).

Plusieurs suggestions ont été faites pour aider les juges dans leur démarche concernant la preuve de faits similaires. Lorsqu'une preuve de faits similaires est produite pour établir l'identité, un degré élevé de similitude doit exister entre les actes puisque cette preuve doit avoir une valeur probante qui l'emporte sur son effet préjudiciable, conformément à ce qui est requis pour qu'elle soit admissible. La similitude entre les actes peut consister en une marque ou signature singulière caractérisant une série de similitudes importantes. Dans l'appréciation de la similitude des actes, le juge du procès devrait uniquement examiner la façon dont les actes ont été commis et non la preuve relative à la participation de l'accusé à chaque acte. Il est bien possible qu'il y ait des exceptions, mais, en règle générale, si le juge du procès est convaincu, lorsqu'il apprécie la similitude des actes de cette façon, qu'il existe entre les actes un degré de similitude tel qu'il est probable que ces derniers ont été commis par la même personne, la preuve de faits simili-

able to consider all the evidence related to the alleged similar acts in determining the accused's guilt for any one act. The test for admissibility of similar fact evidence adduced to prove identity is the same whether the alleged similar acts are definitively attributed to the accused, or are the subject of a multi-count indictment against the accused.

Where the similar acts are alleged as part of a multi-count indictment, the consideration of the admissibility of similar fact evidence must be taken into account in deciding whether the counts should be severed. A motion to sever must be brought by the accused, who bears the burden of establishing on a balance of probabilities that the interests of justice require an order for severance. The burden of demonstrating that similar fact evidence should be admitted must be borne by the Crown.

Where the similar fact evidence adduced to prove identity suggests that the same person committed the similar acts, then logically this finding makes the evidence linking the accused to each similar act relevant to the issue of identity for the offence being tried. Similarly, in a multi-count indictment, the link between the accused and any one count will be relevant to the issue of identity on the other counts which disclose a striking similarity in the manner in which those offences were committed.

A link between the accused and the alleged similar acts is also a precondition to admissibility. The evidence linking the accused to the similar acts does not have to link the acts to the accused as well. Once the trial judge has concluded that the similar acts were likely committed by one person and there is evidence linking the accused to the acts it is not necessary to conclude that the acts were likely committed by the accused. This question must be determined by the trier of fact on the basis of all the evidence relating to the acts. Evidence of mere opportunity showing no more than the possibility that the similar act is that of the accused will not suffice to show the accused's participation in the alleged similar act.

lares aura ordinairement une force probante suffisante pour l'emporter sur son effet préjudiciable et elle peut être admise. Le jury sera alors en mesure d'examiner toute la preuve relative aux faits qui, prétend-on, sont similaires pour déterminer si l'accusé est coupable d'avoir commis l'un ou l'autre des actes. Le critère d'admissibilité d'une preuve de faits similaires produite pour établir l'identité est le même, que les actes similaires allégués soient définitivement attribués à l'accusé ou qu'ils fassent l'objet d'un acte d'accusation reprochant plusieurs chefs d'accusation à l'accusé.

Lorsque les actes similaires allégués font partie d'un acte d'accusation reprochant plusieurs chefs, la question de l'admissibilité d'une preuve de faits similaires doit être prise en considération pour décider s'il convient de séparer les chefs d'accusation. Une requête sollicitant la tenue de procès distincts doit être présentée par l'accusé, lequel a alors le fardeau d'établir, selon la prépondérance des probabilités, que les intérêts de la justice exigent une ordonnance en ce sens. C'est au ministère public qu'il appartient de démontrer que la preuve de faits similaires devrait être admise.

Lorsque la preuve de faits similaires produite pour établir l'identité tend à indiquer que les actes similaires ont été commis par la même personne, alors, logiquement, cette constatation rend la preuve rattachant l'accusé à chaque acte similaire pertinente à l'égard de la question de l'identité pour ce qui concerne l'infraction en cause. De même, dans un acte d'accusation comportant plusieurs chefs d'accusation, le lien entre l'accusé et un chef d'accusation sera pertinent à l'égard de la question de l'identité pour ce qui est des autres chefs d'accusation qui révèlent une similitude frappante du point de vue du mode de perpétration de ces infractions.

L'existence d'un lien entre l'accusé et les actes similaires allégués est également une condition préalable à l'admissibilité. Il n'est pas nécessaire que la preuve liant l'accusé aux actes similaires rattache les actes à l'accusé aussi. Une fois que le juge du procès a conclu que les actes similaires sont probablement le fait d'une seule et même personne, et qu'il existe des éléments de preuve rattachant l'accusé aux actes, il n'est pas nécessaire de conclure que les actes similaires ont probablement été commis par l'accusé. Le juge des faits doit trancher cette question en tenant compte de l'ensemble des éléments de preuve se rapportant aux actes. La preuve d'une simple occasion ne révélant rien d'autre que la possibilité que l'acte similaire soit le fait de l'accusé ne suffira pas pour démontrer la participation de celui-ci à l'acte similaire allégué.

The proper standard to apply to the primary inference drawn from the similar fact evidence is proof on a balance of probabilities. Since the probative value of similar fact evidence, as circumstantial evidence, lies in the unlikelihood of coincidence, it simply does not make sense to require one of the allegations to be proved beyond a reasonable doubt as a prerequisite to the trier of fact's consideration of it. Though the similar fact evidence, standing alone, may fall short of proof beyond a reasonable doubt, it can be relied upon to assist in proving another allegation beyond a reasonable doubt. (The general rule that preliminary findings of fact may be determined on a balance of probabilities is departed from in those certainly rare occasions when admission of the evidence may itself have a conclusive effect with respect to guilt.) The correct approach to a consideration of similar fact evidence by a jury is therefore the "cumulative" or "pooling" approach. Thus, as a general rule where similar fact evidence is adduced to prove identity, the jury should be instructed that once they have concluded that there is sufficient likelihood that the same person committed the alleged similar acts, they may consider all the evidence relating to the similar acts in considering whether the accused is guilty of the act in question.

The following should be included in a proper charge to the jury where similar fact evidence is admitted to prove identity in a multi-count indictment situation:

(1) The trial judge should instruct the jury that they may find from the evidence, though they are not required to do so, that the manner of the commission of the offences is so similar that it is likely they were committed by the same person.

(2) The judge should then review the similarities between the offences.

(3) The jury should then be instructed that if they conclude it is likely the same person committed more than one of the offences, then the evidence on each of those counts may assist them in deciding whether the accused committed the other similar count or counts.

La norme de preuve qu'il convient d'appliquer à l'inférence fondamentale tirée de la preuve de faits similaires est la prépondérance des probabilités. Comme la valeur probante d'une preuve de faits similaires, en tant que preuve circonstancielle, réside dans l'improbabilité d'une coïncidence, il n'est tout simplement pas logique d'exiger qu'une des allégations soit prouvée hors de tout doute raisonnable comme condition préalable à l'examen de cette preuve par le juge des faits. Bien qu'il soit possible que, à elle seule, la preuve de faits similaires n'apporte pas une preuve hors de tout doute raisonnable, elle peut être invoquée pour aider à prouver une autre allégation hors de tout doute raisonnable. (Il y a dérogation à la règle générale selon laquelle les conclusions de fait préliminaires peuvent être tirées selon la prépondérance des probabilités dans les cas, certes rares, où l'admission de la preuve peut elle-même avoir un effet concluant en ce qui concerne la question de la culpabilité.) La bonne approche en ce qui concerne l'examen d'une preuve de faits similaires par un jury est donc l'approche «cumulative» ou approche de la «mise en commun». Par conséquent, en règle générale, lorsqu'une preuve de faits similaires est produite pour établir l'identité, il faudrait donner aux jurés la directive qu'une fois qu'ils ont conclu à l'existence d'une probabilité suffisante que la même personne a commis les actes similaires allégués, ils peuvent tenir compte de tous les éléments de preuve se rapportant aux actes similaires pour décider si l'accusé est coupable de l'acte en question.

Lorsqu'une preuve de faits similaires est admise pour établir l'identité dans le cadre d'un acte d'accusation comportant plusieurs chefs, un bon exposé au jury devrait inclure les facteurs suivants:

(1) Le juge du procès devrait dire aux jurés qu'ils peuvent conclure, à la lumière de la preuve — quoique rien ne les oblige à le faire — que le mode de perpétration des infractions présente des similitudes telles qu'il est probable qu'elles ont été commises par la même personne.

(2) Le juge du procès devrait ensuite passer en revue les similitudes entre les infractions.

(3) Puis, le juge du procès devrait dire aux jurés que, s'ils concluent qu'il est probable que la même personne a commis plus d'une des infractions, alors la preuve relative à chacun de ces chefs d'accusation peut les aider à décider si l'accusé a commis les autres chefs d'accusation similaires.

(4) The trial judge must instruct the jury that if it accepts the evidence of the similar acts, it is relevant for the limited purpose for which it was admitted.

(5) The jury must be warned that they are not to use the evidence on one count to infer that the accused is a person whose character or disposition is such that he or she is likely to have committed the offence or offences charged in the other count or counts.

(6) If they do not conclude that it is likely the same person committed the similar offences, they must reach their verdict by considering the evidence related to each count separately, and put out of their minds the evidence on any other count or counts.

(7) Finally, the trial judge must make it clear that the accused must not be convicted on any count unless the jury are satisfied beyond a reasonable doubt that he or she is guilty of that offence.

The trial judge's charge to the jury that, if they concluded both counts were likely committed by the same person, they could use the evidence on each count to assist in deciding the appellant's guilt on both counts does not offend s. 7 or s. 11(d) of the *Charter*. The additional charge instructing the jury to decide whether the appellant was guilty of the second murder and to decide whether both counts were committed by one person before using the evidence on both counts in respect of either count could not have prejudiced the accused.

If consent to the provision of bodily samples is to be valid it must be an informed consent. Yet if neither the police nor the consenting person limit the use which may be made of the evidence then, as a general rule, no limitation or restriction should be placed on the use of that evidence. The obligation imposed on the police in obtaining a valid consent extends only to the disclosure of those anticipated purposes known to the police at the time the consent was given. In the absence of any limitation placed by the police or the consenting party on the use to be made of the hair sample, there is nothing inherently unfair or illegal about the police retaining evidence obtained in connection with one investigation and using it in connection with a later investigation which was not anticipated by the police at the time the

(4) Le juge du procès doit dire aux jurés que, s'ils acceptent la preuve des actes similaires, cette preuve est pertinente, mais uniquement à l'égard de la fin limitée pour laquelle elle a été admise.

(5) Les jurés doivent être avertis qu'ils ne peuvent pas utiliser la preuve relative à un chef d'accusation pour inférer que l'accusé est une personne possédant une nature ou une disposition telle qu'elle a probablement commis les infractions reprochées dans les autres chefs d'accusation.

(6) Si les jurés ne concluent pas qu'il est probable que la même personne a commis les infractions similaires, ils doivent rendre leur verdict en examinant la preuve relative à chaque chef d'accusation séparément, et faire abstraction de la preuve relative aux autres chefs d'accusation.

(7) Enfin, le juge du procès doit indiquer clairement aux jurés qu'ils ne doivent déclarer l'accusé coupable d'un chef d'accusation que s'ils sont convaincus hors de tout doute raisonnable que l'accusé est coupable de l'infraction en question.

La directive qu'a donnée le juge du procès aux jurés — c'est-à-dire que s'ils concluaient que les infractions reprochées dans les deux chefs d'accusation avaient probablement été commises par la même personne, ils pouvaient utiliser la preuve relative à chaque chef pour statuer sur la culpabilité de l'accusé à l'égard des deux chefs d'accusation — ne porte atteinte ni à l'art. 7 ni à l'al. 11d) de la *Charte*. La directive supplémentaire indiquant aux jurés de décider si l'accusé était coupable du second meurtre et si les infractions reprochées dans les deux chefs d'accusation avaient été commises par une seule et même personne avant d'utiliser la preuve relative aux deux chefs à l'égard de l'un et l'autre chef ne peut pas avoir causé préjudice à l'accusé.

Pour que le consentement au prélèvement d'échantillons de substances corporelles soit valide, il doit reposer sur un consentement éclairé. Toutefois, si ni les policiers ni la personne qui donne son consentement ne limitent l'utilisation qui peut être faite de l'élément de preuve, alors, en règle générale, l'utilisation de cet élément de preuve ne devrait être assortie d'aucune limite ou restriction. L'obligation faite aux policiers d'obtenir un consentement valide ne concerne que la divulgation des objectifs visés et déjà connus des policiers lorsque le consentement est donné. En l'absence de toute restriction dont les policiers ou la partie donnant son consentement auraient assorti l'utilisation devant être faite des échantillons de cheveux ou de poils, il n'y a rien d'intrinsèquement injuste ou illégal dans le fait de permettre

consent was given. Once the accused's hair samples were taken by the police with his unconditional and reasonably informed consent, he ceased to have any expectation of privacy in them. It was not necessary to consider whether the accused may have had a subsisting privacy interest in the samples or in the information that could be obtained from them after he gave his unconditional consent to the authorities to take the samples.

à des policiers de conserver des éléments de preuve recueillis dans le cadre d'une enquête donnée et de les utiliser dans une enquête subséquente qui n'était pas prévue au moment où le consentement a été donné. Une fois les échantillons de cheveux et de poils prélevés par les policiers avec le consentement inconditionnel et raisonnablement éclairé de l'accusé, celui-ci a cessé d'avoir à l'égard de ces échantillons des attentes en matière de respect de sa vie privée. Il est inutile de se demander si, après avoir consenti inconditionnellement au prélèvement des échantillons par les policiers, l'accusé a pu conserver un droit au respect de sa vie privée à l'égard de ces échantillons ou des renseignements susceptibles d'en être tirés.

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APPEAL from a judgment of the British Columbia Court of Appeal (1997), 92 B.C.A.C. 286, 150 W.A.C. 286, 116 C.C.C. (3d) 168, [1997] B.C.J. No. 1193 (QL), dismissing an appeal from conviction by Parrett J. sitting with jury, [1995] B.C.J. No. 882 (QL). Appeal dismissed.

Gil David McKinnon, Q.C., and *Thomas Arbogast*, for the appellant.

Oleh S. Kuzma, for the respondent.

S. Ronald Fainstein, Q.C., and *Chantal Proulx*, for the intervener the Attorney General of Canada.

Jamie C. Klukach, for the intervener the Attorney General for Ontario.

Written submission only by *Arnold Schlayer*, for the intervener the Attorney General for Alberta.

The judgment of the Court was delivered by

Code criminel, L.R.C. (1985), ch. C-46, art. 487.04 [aj. L.C. 1995, ch. 27, art. 1], 591(3)a) [abr. et rempl. L.R.C. (1985), ch. 27 (1^{er} suppl.), art. 119].

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POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (1997), 92 B.C.A.C. 286, 150 W.A.C. 286, 116 C.C.C. (3d) 168, [1997] B.C.J. No. 1193 (QL), qui a rejeté l'appel formé contre la déclaration de culpabilité prononcée par le juge Parrett au terme d'un procès devant jury, [1995] B.C.J. No. 882 (QL). Pourvoi rejeté.

Gil David McKinnon, c.r., et *Thomas Arbogast*, pour l'appelant.

Oleh S. Kuzma, pour l'intimée.

S. Ronald Fainstein, c.r., et *Chantal Proulx*, pour l'intervenant le procureur général du Canada.

Jamie C. Klukach, pour l'intervenant le procureur général de l'Ontario.

Argumentation écrite seulement par *Arnold Schlayer*, pour l'intervenant le procureur général de l'Alberta.

Version française du jugement de la Cour rendu par

CORY J. — There are two principal issues raised in this appeal. First, should a jury be instructed that they may draw conclusions from similar fact evidence on a balance of probabilities? The appellant contends that such an instruction offends the principles of fundamental justice guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms* and the right to be presumed innocent under s. 11(d) of the *Charter*.

Second, does the admission into evidence of hair samples obtained by consent for one police investigation and used in connection with a separate investigation two-and-a-half years later offend the appellant's right to be free from unreasonable search and seizure guaranteed in ss. 7 and 8 of the *Charter*?

I. Factual Background

Marnie Blanchard was last seen at approximately 2:00 a.m. on November 22, 1989, standing alone outside a bar in Prince George, British Columbia. A taxi driver saw a lone male driver of what he believed was a small grey Toyota or Nissan pickup truck pull up beside Marnie Blanchard. He saw that the driver of the truck had black shoulder-length hair and some hair on the side of his face. He observed Ms. Blanchard hesitate and then get into the truck, which drove away.

Almost three weeks later, a cross-country skier found a human jawbone in a clearing approximately 10 kilometres from downtown Prince George. Police later found a skull and various human bones in the clearing. The remains had been disturbed by animals, and as a result medical examiners were unable to establish a cause of death. A pathologist testified that there had been no pre-death injury to the bones. A comparison of dental records established the identity of the body as that of Marnie Blanchard.

LE JUGE CORY — Deux questions principales sont soulevées dans le cadre du présent pourvoi. Premièrement, devrait-on donner au jury la directive qu'il peut tirer, selon la prépondérance des probabilités, des conclusions fondées sur une preuve de faits similaires? Selon l'appelant, une telle directive porte atteinte aux principes de justice fondamentale garantis par l'art. 7 de la *Charte canadienne des droits et libertés* et au droit à la présomption d'innocence énoncé à l'al. 11d) de la *Charte*.

Deuxièmement, l'admission en preuve d'échantillons de cheveux et de poils qui ont été obtenus avec le consentement de l'intéressé au cours d'une enquête policière puis utilisés dans le cadre d'une enquête distincte deux ans et demi plus tard porte-t-elle atteinte au droit de l'appelant d'être protégé contre les fouilles, les perquisitions et les saisies abusives garanti par les art. 7 et 8 de la *Charte*?

I. Les faits

Marnie Blanchard a été vue pour la dernière fois vers 2 h le 22 novembre 1989. Elle était alors seule à l'extérieur d'un bar de Prince George, en Colombie-Britannique. Un chauffeur de taxi a vu un homme seul, au volant d'un véhicule qui lui a semblé être une petite camionnette grise de marque Toyota ou Nissan, s'arrêter à côté de Marnie Blanchard. Il a vu que le conducteur de la camionnette avait des cheveux noirs jusqu'aux épaules et des poils sur le côté du visage. Il a remarqué que M^{me} Blanchard a hésité et est ensuite montée dans la camionnette, qui a démarré.

Presque trois semaines plus tard, un skieur de fond a trouvé un maxillaire humain dans une clairière située à une dizaine de kilomètres du centre-ville de Prince George. Les policiers ont par la suite trouvé un crâne et divers autres ossements humains dans la clairière. Comme des animaux avaient remué les restes, les médecins légistes ont été incapables de déterminer la cause de la mort. Un pathologiste a témoigné que les ossements ne laissaient voir aucune trace de lésion antérieure au décès. La comparaison des fiches dentaires a permis d'identifier le cadavre comme étant celui de Marnie Blanchard.

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⁵ Police also discovered Ms. Blanchard's coat, sweater and a piece of nylon pantyhose in a pile. The remainder of her clothes, as well as portions of clothing and personal possessions were scattered around the clearing. There was evidence that a sharp-edged implement had been used to cut some of the clothing (the skirt in the area of the zipper and the camisole) and that the victim's sweater had been extensively damaged by cutting or tearing. A hair and fibre analyst also testified that animal chewing could have caused some of the damage to the clothes.

⁶ The Crown's forensic pathologist expressed the opinion that the death was the result of homicidal violence for three reasons: the clothing had been cut and torn, then placed where it was found; the area was remote; the skeletonization of the bones and scattering by animal activity did not fit with a natural death.

⁷ Thorone Fontaine, an acquaintance of the appellant, testified that he went out drinking with the appellant one evening in November 1989, though he was not sure of the date. When the appellant dropped off Mr. Fontaine at the end of the evening, he noticed that the appellant drove back downtown, the opposite direction to where he lived. The next day the appellant went to Mr. Fontaine's home and told him that he had arrived home late because he had picked up a young woman and driven her to Vanderhoof. The appellant told Mr. Fontaine that when he dropped her off, the woman had left some jewellery on his dashboard. Mr. Fontaine observed that the sleeve around the gear shift in the appellant's truck was damaged and that the arm controlling the signal switch and windshield wipers was broken.

⁸ Evidence was given by Sharon Olson, another acquaintance of the appellant, that on or about November 22, 1989, the appellant told her that he had dropped off a friend with whom he had been drinking, and then picked up an attractive blonde woman and drove her home. He gave Ms. Olson

Les policiers ont également découvert des vêtements empilés, soit le manteau, le chandail et une partie du bas-culotte que portait M^{me} Blanchard. Le reste des vêtements, ainsi que des morceaux d'étoffe et des effets personnels étaient éparpillés dans la clairière. Il y avait des indices qu'un instrument tranchant avait été utilisé pour taillader certains vêtements (la jupe près de la fermeture éclair et le cache-corset) et que le chandail de la victime avait été très abîmé par des taillades ou des déchirures. Un spécialiste des cheveux et fibres a témoigné qu'il était également possible que des animaux aient abîmé les vêtements en les mâchant.

Le médecin légiste qui a témoigné pour le ministère public a exprimé l'opinion que la mort était attribuable à des violences meurtrières pour trois raisons: les vêtements avaient été taillés et déchirés, puis placés à l'endroit où ils ont été trouvés; les restes avaient été trouvés dans une région éloignée; la squelettisation des os et leur dispersion par des animaux ne concordaient pas avec une mort naturelle.

Thorone Fontaine, une connaissance de l'appellant, a témoigné qu'il était allé prendre un verre avec celui-ci un soir de novembre 1989, bien qu'il ne fût pas certain de la date. Lorsque l'appellant l'a déposé à la fin de la soirée, M. Fontaine a remarqué que ce dernier était reparti vers le centre-ville, dans la direction inverse de son domicile. Le lendemain, l'appellant s'est rendu chez M. Fontaine et lui a dit qu'il était rentré tard parce qu'il avait fait monter une jeune femme et l'avait conduite à Vanderhoof. L'appellant a déclaré à M. Fontaine que, lorsqu'il avait déposé la jeune femme, celle-ci avait laissé des bijoux sur le tableau de bord de la camionnette. Monsieur Fontaine a remarqué que la gaine du levier de vitesse de la camionnette de l'appellant était endommagée et que le bras commandant l'interrupteur de signalisation et les essuie-glaces était brisé.

Sharon Olson, une autre connaissance de l'appellant, a témoigné que, le 22 novembre 1989 ou vers cette date, l'appellant lui a dit qu'il avait déposé un ami avec lequel il avait pris un verre et qu'il avait ensuite fait monter une jolie blonde qu'il avait ramenée chez elle. Ces propos ont donné à

the impression that he had had sex with the woman and that she had given him jewellery in exchange. He told Ms. Olson that his common-law wife found the jewellery in his pocket. Arlene Spencer, another acquaintance, testified that on or about November 23, 1989, the appellant also told her that the night before he had picked up a girl and had driven her to Vanderhoof. She did not have the money she had promised him for gas, so she gave him some jewellery instead. The appellant had said his wife was upset when she found the jewellery in his pocket.

On April 18, 1990, police searched a grey Nissan pickup truck registered in the name of the appellant's common-law wife. In the driver's door pocket they found a double-edged knife with a four-inch blade. Under the passenger seat they found a small silver ring that was later identified as Ms. Blanchard's by several of her friends. In searching the pickup, the officers also recovered two small purple fibres from the carpet underneath the passenger seat area, and they cut out a section of the carpeting. A hair and fibre expert testified that he examined those fibres and others he extracted from the carpet. He compared them to Ms. Blanchard's sweater found in the clearing with her remains. He concluded that the fibres taken from the vehicle were consistent with the fibres used in the manufacture of the purple sweater.

On July 26, 1990, the appellant was arrested for the second degree murder of Ms. Blanchard. The appellant was advised of his *Charter* rights and given an opportunity to call a lawyer. After his call to a lawyer, the appellant told police that he had been advised not to say anything. Nevertheless, the officers questioned the appellant for approximately 25 minutes, during which the appellant insisted that he did not pick up a girl in November. One of the officers then asked the appellant if he would be interested in helping them eliminate him as a sus-

M^{me} Olson l'impression que l'accusé avait eu des rapports sexuels avec la femme en question et que celle-ci lui avait donné des bijoux en échange. Il a déclaré à M^{me} Olson que sa conjointe de fait avait trouvé les bijoux dans sa poche. Arlene Spencer, une autre connaissance de l'appelant, a témoigné que, le 23 novembre 1989 ou vers cette date, l'appelant lui a également dit que, le soir précédent, il avait fait monter une jeune fille et l'avait conduite à Vanderhoof. Comme la jeune fille n'avait pas l'argent qu'elle lui avait promis pour l'essence, elle lui avait donné des bijoux à la place. L'appelant avait déclaré que sa conjointe avait été contrariée lorsqu'elle avait trouvé les bijoux en question dans sa poche.

Le 18 avril 1990, des policiers ont fouillé une camionnette grise de marque Nissan immatriculée au nom de la conjointe de fait de l'appelant. Dans la poche aumônière de la porte du conducteur, ils ont trouvé un couteau à double tranchant muni d'une lame de quatre pouces. Sous le siège du passager, ils ont découvert une petite bague en argent, qui a par la suite été identifiée comme appartenant à M^{me} Blanchard par plusieurs de ses amis. En fouillant la camionnette, les policiers ont également trouvé deux petites fibres de couleur mauve dans le tapis sous le siège du passager, et ils ont taillé une partie du tapis. Un expert en cheveux et fibres a témoigné qu'il avait examiné ces fibres et d'autres fibres qu'il avait extraites du tapis. Il les a comparées avec le chandail de M^{me} Blanchard qui avait été découvert avec ses restes dans la clairière. L'expert est arrivé à la conclusion que les fibres trouvées dans le véhicule correspondaient aux fibres utilisées pour fabriquer le chandail mauve.

Le 26 juillet 1990, l'appelant a été arrêté pour le meurtre au deuxième degré de M^{me} Blanchard. On l'a informé des droits que lui garantit la *Charte* et on lui a donné la possibilité de téléphoner à un avocat. Après avoir téléphoné à un avocat, l'appelant a déclaré aux policiers que l'avocat lui avait conseillé de ne rien dire. Néanmoins, les policiers ont interrogé l'appelant pendant environ 25 minutes, au cours desquelles celui-ci a affirmé qu'il n'avait fait monter aucune jeune fille en novembre. L'un des policiers a ensuite demandé à

pect. The appellant replied, "That would be great with me" and agreed to give scalp and pubic hair samples. He was informed that the samples would be used to determine whether any of his hair was found where Ms. Blanchard's body was discovered. He acknowledged that he did not have to give this sample. The officer further informed the appellant that if he gathered any evidence as a result of the hair sample, it would be used in court.

l'appelant s'il était intéressé à les aider à l'éliminer comme suspect. L'appelant a répondu que [TRANSLATION] «ce serait génial», et il a accepté de fournir des échantillons de cheveux et de poils pubiens. Il a été avisé que les échantillons serviraient à déterminer si des cheveux ou des poils lui appartenant avaient été trouvés à l'endroit où l'on avait découvert les restes de M^{me} Blanchard. Il a reconnu qu'il n'était pas obligé de donner ces échantillons. Le policier a en outre dit à l'appelant que si ces échantillons lui permettaient de recueillir quelque élément de preuve, cet élément serait utilisé devant les tribunaux.

¹¹ It is common ground that the investigating officers did not contemplate using the hair samples for DNA analysis; the use of the technology was not common in July 1990. The hair samples were forwarded to the RCMP forensic laboratory in Vancouver for physical comparisons with hairs found at the scene where Ms. Blanchard's body was discovered. The appellant's hair did not match with 16 hair samples taken from Ms. Blanchard's coat and other items.

Il est acquis que les enquêteurs n'envisageaient pas d'utiliser les échantillons de cheveux et de poils pour effectuer une analyse génétique; le recours à cette technologie n'était pas courant en 1990. Les échantillons ont été remis au laboratoire judiciaire de la GRC à Vancouver pour qu'on procède à des comparaisons physiques avec des cheveux et des poils trouvés à l'endroit où les restes de M^{me} Blanchard avaient été découverts. Les cheveux et les poils de l'appelant ne concordaient pas avec les 16 échantillons de cheveux et de poils tirés du manteau et d'autres effets de M^{me} Blanchard.

¹² Following a preliminary inquiry into the charge for the murder of Marnie Blanchard, the provincial court judge declined to commit the appellant for trial. He was discharged and released on December 17, 1990.

À la suite de l'enquête préliminaire tenue à l'égard de l'accusation relative au meurtre de Marnie Blanchard, le juge de la cour provinciale a refusé de citer l'appelant à procès. Celui-ci a été libéré le 17 décembre 1990.

¹³ On February 13, 1993, Theresa Umphrey arrived in Prince George and drank with friends at several pubs. Between 2:20 and 3:40 a.m. on February 14 she was seen near a convenience store. She was intoxicated. She asked some men for a ride home and they drove her around, but when she was unable to identify where she lived, they returned her to the vicinity of the convenience store. At approximately 2:30 p.m. on February 14, Ms. Umphrey's nude, partially frozen body was found on a snowbank approximately 50 kilometres southwest of Prince George.

Le 13 février 1993, Theresa Umphrey est arrivée à Prince George et a pris un verre avec des amis dans plusieurs pubs. Entre 2 h 20 et 3 h 40 le 14 février, elle a été vue près d'un dépanneur. Elle était ivre. Elle a demandé à des hommes de la reconduire chez elle. Après avoir roulé dans la ville, ils l'ont ramenée près du dépanneur parce qu'elle était incapable de reconnaître l'endroit où elle habitait. Vers 14 h 30 le 14 février, on a découvert le corps nu et partiellement gelé de M^{me} Umphrey sur un banc de neige à une cinquantaine de kilomètres au sud-ouest de Prince George.

¹⁴ The forensic pathologist who performed the autopsy on the body of Ms. Umphrey testified that

Le médecin légiste qui a fait l'autopsie du cadavre de M^{me} Umphrey a témoigné que la mort avait

death was caused by manual strangulation and then ligature strangulation. The ligature marks were consistent with being caused by shoelaces such as those found at the scene. There were numerous scrapes on her body consistent with having been dragged over a rough surface. Her skull was severely crushed. A portion of her hair close to the scalp wound had been cut short with a sharp instrument such as scissors or a knife. The pathologist confirmed that Ms. Umphrey had sexual intercourse some time during the last 24 to 28 hours of her life, based on sperm found in her vaginal cavity. There was no physical evidence of sexual assault. Semen was also found on Ms. Umphrey's sweatshirt.

Most of Ms. Umphrey's clothes were found at the scene scattered down the embankment near her body in a pattern consistent with having been thrown. Her brassiere was found at the side of the road 1.4 kilometres north of her body. An RCMP expert in fibre analysis and damage to fabrics testified that the brassiere was cut apart between the cups and knotted at the back where it is normally fastened. One of the shoelaces was also cut. The cuts had been made by a sharp-edged instrument. Other articles of Ms. Umphrey's clothing did not disclose any evidence of damage.

While out of custody and prior to being charged, the appellant was interviewed by the police on several occasions. During the last interview, a police officer told the appellant that some human tissue not belonging to Ms. Umphrey had been found on her body and asked the appellant to provide samples for DNA testing. The officer said they were in the process of comparing the appellant's hair sample taken in 1990 to the human tissue sample taken from the body of Ms. Umphrey. The appellant refused to give samples for DNA testing.

During the interview, the appellant had been allowed to smoke several of his own cigarettes.

eu lieu par strangulation manuelle et ensuite par strangulation par ligature. Les marques de ligature étaient compatibles avec les marques qu'auraient laissées des lacets de chaussures semblables à ceux trouvés sur le lieu du crime. Le corps de la victime portait de nombreuses éraflures, comme s'il avait été traîné sur une surface rugueuse. Son crâne avait été gravement enfoncé. Près de la blessure au cuir chevelu, ses cheveux avaient été coupés court avec un instrument tranchant comme des ciseaux ou un couteau. Le médecin légiste a confirmé que, d'après le sperme trouvé dans son vagin, M^{me} Umphrey avait eu des rapports sexuels de 24 à 28 heures avant sa mort. Il n'y avait aucun signe physique d'agression sexuelle. On a également trouvé du sperme sur le sweatshirt de M^{me} Umphrey.

La plupart des vêtements de M^{me} Umphrey ont été trouvés sur le lieu du crime, éparpillés au pied du banc de neige près de son corps, comme s'ils avaient été lancés là. Son soutien-gorge a été retrouvé au bord de la route, à 1,4 kilomètre au nord de l'endroit où se trouvait le corps. Un membre de la GRC spécialisé dans l'analyse des fibres et des dommages causés aux tissus a témoigné que le soutien-gorge avait été coupé entre les deux bonnets et noué dans le dos à l'endroit où il est normalement attaché. L'un des lacets avait également été coupé. Dans les deux cas, on s'était servi d'un instrument tranchant. D'autres vêtements de M^{me} Umphrey étaient intacts.

L'appellant a été interrogé à plusieurs reprises par des policiers pendant qu'il était en liberté et avant qu'il ne soit accusé. Au cours du dernier interrogatoire, un policier a dit à l'appellant que certains tissus humains n'appartenant pas à M^{me} Umphrey avaient été trouvés sur le corps de celle-ci, et il a demandé à l'appellant de fournir des échantillons en vue d'analyses génétiques. Le policier a dit qu'ils étaient en train de comparer les échantillons de cheveux et de poils prélevés sur l'appellant en 1990 avec l'échantillon de tissus humains provenant du corps de M^{me} Umphrey. L'appellant a refusé de fournir les échantillons en question.

Pendant l'interrogatoire, l'appellant avait été autorisé à fumer plusieurs de ses propres ciga-

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After the interview, an officer returned to the interview room and gathered the butts of the cigarettes that the appellant had been smoking and which he had placed in an ashtray. A few days later, an officer executed a search warrant at the RCMP forensic laboratory in Vancouver and took possession of the appellant's scalp and pubic hairs that had been taken from him on July 26, 1990.

rettes. Après l'interrogatoire, un agent est retourné dans la salle d'interrogatoire et a ramassé les mégots des cigarettes que l'appelant avait fumées et qu'il avait déposés dans un cendrier. Quelques jours plus tard, un agent a exécuté un mandat de perquisition au laboratoire judiciaire de la GRC à Vancouver et a pris possession des cheveux et des poils pubiens qui avaient été prélevés sur l'appelant le 26 juillet 1990.

18 Barbara Fraser, a forensic biology specialist employed at the RCMP forensic laboratory found there was a five-probe visual match between the pubic hairs obtained from the appellant on July 26, 1990, the cigarette butts retrieved from the interview room and the semen fraction located in the vagina of Ms. Umphrey and the semen fraction located on her sweater. Ms. Fraser explained in her testimony that a five-probe match occurs when there is a match between five different regions in two samples of DNA. A five-probe match is an extremely rare event to occur between unrelated individuals. Based on these results, Ms. Fraser expressed the opinion that this frequency of occurrence in the Canadian Caucasian population was less than one in 31 billion.

Barbara Fraser, spécialiste en biologie judiciaire au laboratoire judiciaire de la GRC, a constaté qu'il y avait concordance visuelle de cinq sondes entre les poils pubiens prélevés sur l'appelant le 26 juillet 1990, les mégots récupérés dans la salle d'interrogatoire, le sperme trouvé dans le vagin de M^{me} Umphrey et celui trouvé sur son chandail. Dans son témoignage, M^{me} Fraser a expliqué qu'il y a concordance de cinq sondes lorsque cinq régions différentes de deux échantillons d'ADN sont identiques. Une telle adéquation est extrêmement rare entre des personnes qui n'ont aucun lien de parenté. En s'appuyant sur ces résultats, M^{me} Fraser a exprimé l'opinion que cette fréquence d'apparition au sein de la population canadienne de race blanche était inférieure à un sur 31 milliards.

19 Ms. Fraser also compared the DNA from the cigarette butts with DNA from the blood of the appellant's natural mother and father over five probes. The analysis showed that the rules of inheritance were followed, with one of the appellant's DNA bands matching one of his father's DNA bands and the other matching one of his mother's DNA bands. Ms. Fraser concluded that in her opinion it was 30 million times more likely that the DNA in the semen samples came from a biological child of the appellant's parents than from an individual selected randomly from the Canadian population.

Madame Fraser a également comparé l'ADN provenant des mégots avec l'ADN provenant du sang de la mère et du père biologiques de l'appelant au moyen de cinq sondes. L'analyse a révélé que les règles d'hérédité étaient respectées puisque l'une des bandes d'ADN de l'appelant était identique à une des bandes d'ADN de son père, et que l'autre bande était identique aux bandes d'ADN de sa mère. Madame Fraser a conclu que, à son avis, il y avait 30 millions de fois plus de chances que l'ADN des échantillons de sperme provienne d'un enfant biologique des parents de l'appelant plutôt que d'une personne choisie au hasard dans la population canadienne.

20 On October 4, 1993, the appellant was arrested and charged with the first degree murder of Theresa Umphrey. The appellant was also re-arrested and charged with the first degree murder of Marnie Blanchard.

Le 4 octobre 1993, l'appelant a été arrêté et inculpé du meurtre au premier degré de Theresa Umphrey. En outre, il a à nouveau été arrêté à l'égard du meurtre de Marnie Blanchard et inculpé de meurtre au premier degré.

Prior to trial, defence counsel twice applied to sever the two murder counts in the indictment. These applications were refused. Counsel also objected to the admissibility of the samples taken and used by the police for DNA analysis and the DNA evidence itself. The evidence was ruled admissible. A jury convicted the appellant of the two counts of first degree murder. His appeal to the Court of Appeal was dismissed.

II. Judgments Below

A. *Supreme Court of British Columbia*, [1995] B.C.J. No. 882 (QL), (Parrett J.)

1. The Rulings on Severance

On October 13, 1994, the appellant applied under s. 591(3)(a) of the *Criminal Code*, R.S.C., 1985, c. C-46, to sever the two murder counts. The trial judge noted that on such an application, the onus is on the accused to show that the interest of justice requires severance. The defence pointed to the discharge of the appellant at the preliminary inquiry into the Blanchard murder in 1990, and submitted that the Crown was attempting to use the similar fact evidence of the Umphrey murder to establish primarily that Ms. Blanchard's death was the result of homicide. Defence counsel argued there was no precedent for this use of similar fact evidence. The defence further submitted that there was no nexus in time between the two murders, that there are numerous differences between the two events, and that the similarities that do exist are not unique.

The Crown opposed the application and asserted that even in the case of severance, it would seek to adduce the evidence of each offence in the other trial as similar fact evidence. The Crown conceded that unless the evidence concerning the Umphrey murder was admissible to establish that the

Avant le procès, l'avocat de la défense a demandé à deux reprises que les deux chefs d'accusation de meurtre contenus dans l'acte d'accusation soient séparés. Ces demandes ont été rejetées. L'avocat a également contesté l'admissibilité et des échantillons prélevés par les policiers et utilisés pour les analyses génétiques, et de la preuve génétique elle-même. Cette preuve a été déclarée admissible. Un jury a reconnu l'appelant coupable des deux chefs d'accusation de meurtre au premier degré. L'appel formé par ce dernier devant la Cour d'appel a été rejeté.

II. Les décisions des juridictions inférieures

A. *Cour suprême de la Colombie-Britannique*, [1995] B.C.J. No. 882 (QL) (le juge Parrett)

1. Les décisions relatives à la séparation des chefs d'accusation

Le 13 octobre 1994, l'appelant a demandé la séparation des deux chefs d'accusation de meurtre en application de l'al. 591(3)a) du *Code criminel*, L.R.C. (1985), ch. C-46. Le juge du procès a fait remarquer que l'accusé qui présente une telle demande a la charge de prouver que les intérêts de la justice commandent la séparation. La défense a souligné que l'appelant avait été libéré au terme de l'enquête préliminaire concernant le meurtre de M^{me} Blanchard en 1990, et a soutenu que le ministère public tentait d'utiliser la preuve des faits similaires du meurtre de M^{me} Umphrey principalement pour établir que le décès de M^{me} Blanchard résultait d'un homicide. L'avocat de la défense a affirmé qu'il n'y avait aucun précédent pour cette utilisation d'une preuve de faits similaires. La défense a en outre fait valoir qu'il n'y avait aucune connexité dans le temps entre les deux meurtres, qu'il y avait de nombreuses différences entre les deux événements et que les similitudes qui existaient n'étaient pas singulières.

Le ministère public s'est opposé à la demande et a plaidé que, même s'il y avait séparation des chefs d'accusation, il chercherait à produire la preuve de chaque infraction dans l'autre procès comme preuve de faits similaires. Le ministère public a concédé que les deux chefs d'accusation devraient

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accused committed the Blanchard murder, there should be a severance of the two counts. However, the Crown argued that there were many similarities between the two events indicative of pattern and design.

être séparés, sauf si la preuve relative au meurtre de M^{me} Umphrey était admissible pour prouver que l'accusé avait assassiné M^{me} Blanchard. Le ministère public a toutefois soutenu qu'il y avait, entre les deux événements, de nombreuses similitudes indicatives d'une méthode et d'un plan.

24 The trial judge noted that medical examiners were unable to determine the cause of Ms. Blanchard's death. He noted that her clothing was found near her body and that some of it was torn and some of it appeared to have been cut with a sharp instrument such as a knife. The trial judge found it was a fair inference that Ms. Blanchard's death was not natural and that her clothing had been removed prior to her body's being left in the snow.

Le juge du procès a signalé que les médecins légistes avaient été incapables de déterminer la cause du décès de M^{me} Blanchard. Il a indiqué que les vêtements de la victime avaient été trouvés près de son corps et que certains d'entre eux avaient été déchirés tandis que d'autres semblaient avoir été taillés avec un instrument tranchant tel un couteau. Selon le juge du procès, il était raisonnable d'en déduire que M^{me} Blanchard n'était pas morte naturellement et qu'on l'avait dévêtue avant d'abandonner son corps dans la neige.

25 The trial judge reviewed the evidence related to the murder of Theresa Umphrey. The trial judge noted that the Crown submitted the crimes were similar in that the victims were young single females who were vulnerable and who were without funds or transportation in the early morning hours; there was evidence that each was picked up by the accused in a grey pickup truck; the Umphrey case clearly involved sexual intercourse, while in the Blanchard murder a sexual purpose could be inferred; the victims were left in isolated but accessible areas outside Prince George; the victims' clothes were found discarded nearby; there was evidence that in both cases a sharp-edged instrument such as a knife was used.

Le juge du procès a examiné la preuve relative au meurtre de Theresa Umphrey. Il a souligné que le ministère public avait affirmé que les crimes étaient similaires en ce que les victimes étaient de jeunes femmes célibataires qui étaient vulnérables et sans argent ou sans moyen de transport aux petites heures du matin; il y avait des preuves indiquant que, dans chaque cas, l'accusé avait fait monter la victime dans une camionnette grise; dans l'affaire Umphrey, il y avait manifestement eu rapports sexuels, tandis que dans l'affaire Blanchard, on pouvait inférer que le meurtre était lié à une fin sexuelle; les victimes avaient été abandonnées dans des régions isolées mais néanmoins accessibles à l'extérieur de Prince George; leurs vêtements avaient été trouvés abandonnés à proximité; dans les deux cas, il y avait des preuves de l'utilisation d'un instrument tranchant tel un couteau.

26 The trial judge further noted that in the Umphrey case, the DNA analysis linked the accused to the victim. In the Blanchard case, circumstantial evidence also linked the accused to the victim, e.g., the testimony of a witness who saw Ms. Blanchard get into a pickup truck similar to one used by the appellant; the ring found in the appellant's truck identified as belonging to Ms. Blanchard; the purple fibres in the truck found to be consistent with Ms. Blanchard's sweater. The Crown submitted that this evidence demonstrates a

Le juge du procès a en outre signalé que, dans l'affaire Umphrey, l'analyse génétique rattachait l'accusé à la victime. Dans l'affaire Blanchard, il y avait des éléments de preuve circonstancielle rattachant également l'accusé à la victime, par exemple la déposition d'un témoin ayant vu M^{me} Blanchard monter dans une camionnette semblable à celle conduite par l'appelant; la bague trouvée dans la camionnette de l'appelant et qui avait été identifiée comme appartenant à M^{me} Blanchard; les fibres mauves trouvées dans la camionnette et qui avaient

system and method by which the accused seeks out and identifies his victims, as well as the way he deals with them and disposes of the bodies.

The trial judge reviewed the governing authorities on similar fact evidence, the similarities between the two offences and the potential prejudice to the appellant. He found that the appellant had not met his burden under s. 591 of the *Code*. He found “significant and striking similarities” between the two deaths. The trial judge concluded that if the evidence linking the appellant to both victims on the nights they disappeared were admitted, then the evidence related to the Umphrey killing “is both relevant and highly probative of material issues in the Blanchard case”. The trial judge denied the appellant’s motion for severance, but invited the appellant to renew the application for severance once the rulings on admissibility were completed.

At the end of a lengthy *voir dire*, the defence renewed its application for severance. The trial judge found that although some evidence had been excluded, the Crown’s case remained essentially unchanged. The application for severance was again denied. There was no separate consideration of the admissibility of the similar fact evidence aside from the motion for severance.

2. Ruling on Admissibility of Hair Samples and DNA Evidence

Several *voir dire*s were held to determine the admissibility of the hair samples obtained from the appellant in 1990. The trial judge found that the central issue in determining whether the hair samples and DNA evidence derived from them were admissible was not whether the appellant’s consent

été déclarées compatibles avec celles du chandail de M^{me} Blanchard. Le ministère public a soutenu que ces éléments de preuve démontraient l’existence d’un système et d’une méthode au moyen desquels l’accusé cherche et trouve ses victimes, ainsi que du traitement qu’il leur fait subir et de la façon dont il se débarrasse des corps.

Le juge du procès a examiné la jurisprudence et la doctrine concernant la preuve de faits similaires, les similitudes entre les deux infractions et le risque de préjudice pour l’appellant. Il a conclu que l’appellant ne s’était pas acquitté du fardeau qui lui incombait en vertu de l’art. 591 du *Code*. Il a relevé des [TRADUCTION] «similitudes importantes et frappantes» entre les deux décès. Le juge du procès a conclu que, si la preuve rattachant l’appellant aux deux victimes les nuits où elles ont disparu était admise, alors la preuve relative au meurtre de M^{me} Umphrey [TRADUCTION] «est à la fois pertinente et très probante en ce qui a trait aux questions substantielles dans l’affaire Blanchard». Le juge du procès a rejeté la requête en séparation des chefs d’accusation présentée par l’appellant, mais il a invité ce dernier à présenter une nouvelle demande en ce sens une fois que les décisions relatives à l’admissibilité auraient été rendues.

Au terme d’un long *voir-dire*, la défense a renouvelé sa demande de séparation des chefs d’accusation. Le juge du procès a conclu que, malgré l’exclusion de certains éléments de preuve, la preuve du ministère public demeurerait essentiellement inchangée. La demande de séparation a de nouveau été rejetée. Il n’y a pas eu d’examen distinct de l’admissibilité de la preuve de faits similaires en dehors de la requête en séparation des chefs d’accusation.

2. La décision relative à l’admissibilité des échantillons de cheveux et de poils et de la preuve génétique

Plusieurs *voir-dire* ont été tenus pour statuer sur l’admissibilité des échantillons de cheveux et de poils obtenus de l’appellant en 1990. Le juge du procès a conclu que la question centrale pour décider de l’admissibilité de ces échantillons et de la preuve génétique en découlant n’était pas de savoir

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in 1990 was limited to the Blanchard investigation, but whether an informed and valid consent can be limited in law. In his opinion, there was no principle in law that made it unreasonable or unlawful for the police to resort to the samples already in their possession as a result of the consent given in 1990. The appellant's later refusal to provide a hair or blood sample in 1993 did not affect this conclusion. Moreover, the trial judge found that the initial consent to the taking of the hair samples was not limited either to using those samples for the purposes of a simple comparison with hairs found at the scene of the Blanchard murder or to using those samples only for the purposes of the 1990 investigation. Such a limitation would contradict the appellant's own understanding that any information obtained from the samples could be used against him.

3. Charge to the Jury

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The trial judge instructed the jury on the use of the similar fact evidence. He stated that the evidence on the Blanchard killing was admissible in proving the guilt of the appellant for the Umphrey killing and *vice versa*. The jury could use this evidence only for the purpose of deciding that the appellant was the person who committed the offences described in both counts, i.e., to resolve the issue of identity. When examining the evidence on both counts, they were instructed not to conclude that the appellant was a person whose character or disposition was such that he likely committed the offences. The trial judge stated that they could infer from the evidence, although they were not required to do so, that the incident mentioned in the Blanchard count and the incident mentioned in the Umphrey count had characteristics in common that were so strikingly similar that it was likely that they were committed by one person. When deciding whether there were similarities between the two incidents, they should examine all the evidence and consider whether or not the acts were strikingly similar and demonstrated a unifying

si le consentement donné par l'appelant en 1990 se limitait à l'enquête menée dans l'affaire Blanchard, mais si un consentement éclairé et valide peut être limité en droit. À son avis, il n'existait aucun principe juridique qui rendait déraisonnable ou illicite l'utilisation par les policiers d'échantillons déjà en leur possession en raison du consentement donné en 1990. Le refus subséquent de l'appelant de fournir des échantillons de cheveux, de poils ou de sang en 1993 ne modifiait pas cette conclusion. En outre, le juge du procès a conclu que le consentement initial au prélèvement des échantillons de cheveux et de poils ne se limitait pas à l'utilisation de ces échantillons en vue d'une simple comparaison avec les cheveux et les poils trouvés à l'endroit où M^{me} Blanchard avait été assassinée, ni à leur utilisation uniquement dans le cadre de l'enquête menée en 1990. Pareille restriction irait à l'encontre de la compréhension qu'avait l'appelant lui-même du fait que toute information obtenue à l'aide de ces échantillons pourrait être utilisée contre lui.

3. L'exposé au jury

Le juge du procès a donné au jury des directives sur l'utilisation de la preuve de faits similaires. Il a déclaré que la preuve relative au meurtre de M^{me} Blanchard était admissible pour prouver la culpabilité de l'appelant relativement au meurtre de M^{me} Umphrey, et *vice versa*. Le jury pouvait utiliser cette preuve uniquement pour décider si l'appelant était la personne qui avait commis les infractions mentionnées dans les deux chefs d'accusation, c.-à-d. pour trancher la question de l'identité. Les jurés ont été informés que, dans l'examen de la preuve relative aux deux chefs d'accusation, ils ne devaient pas en inférer que l'appelant était une personne possédant une nature ou une disposition telle qu'il avait probablement commis les infractions. Le juge du procès a déclaré que le jury pouvait, quoique rien ne l'obligeât à le faire, déduire de la preuve que l'incident mentionné dans le chef d'accusation relatif à l'affaire Blanchard et celui mentionné dans le chef d'accusation relatif à l'affaire Umphrey avaient des caractéristiques communes dont la similitude était tellement frappante qu'ils étaient probablement le fait d'une seule et même

ing pattern. The trial judge then gave the jury some examples of the similarities between the counts.

The trial judge went on to tell the jury that if they concluded that the Blanchard count and the Umphrey count were likely committed by one person, then the evidence on each count could assist them in deciding whether the appellant committed the offences charged in both counts. If, however, they did not draw the inference that the two offences were likely committed by one person, then in reaching a decision on any count they must only consider the evidence relating to that count and put out of their minds the evidence on the other count. The trial judge also stated that if they accepted the evidence on the Umphrey count and concluded that the appellant was guilty of that count, and they also concluded that the Blanchard count was likely committed by the same person, they could use the evidence, particularly of the use of the sharp-edged instrument, to confirm or support the evidence of the other witnesses and the finding of the ring and the purple fibres. The trial judge concluded by telling the jury that they must keep in mind that the appellant could not be convicted of either the Blanchard count or the Umphrey count unless they were satisfied beyond a reasonable doubt that he was guilty as charged.

B. *Court of Appeal* (1997), 92 B.C.A.C. 286 (Hinds J.A. for the court)

The appellant argued before the Court of Appeal that the trial judge's charge regarding similar fact evidence was based on *R. v. Simpson* (1977), 35 C.C.C. (2d) 337 (Ont. C.A.), which should not be

personne. Pour décider s'il existait des similitudes entre les deux incidents, le jury devait examiner tous les éléments de preuve et se demander si les actes possédaient des similitudes frappantes et révélaient l'existence d'une méthode commune. Le juge du procès a ensuite donné au jury des exemples de similitudes entre les chefs d'accusation.

Le juge du procès a poursuivi son exposé en disant aux jurés que, s'ils arrivaient à la conclusion que les infractions reprochées dans les affaires Blanchard et Umphrey étaient probablement le fait d'une seule et même personne, ils pouvaient alors recourir à la preuve relative à chaque chef d'accusation afin de décider si l'accusé avait commis les infractions reprochées dans les deux chefs d'accusation. Toutefois, s'ils ne déduisaient pas que les deux infractions avaient probablement été commises par la même personne, ils devaient alors tenir compte uniquement de la preuve relative au chef d'accusation concerné pour parvenir à une décision à l'égard de ce chef, et faire abstraction de la preuve relative à l'autre chef. Le juge du procès a également déclaré que si les jurés acceptaient la preuve relative à l'accusation portée dans l'affaire Umphrey et concluaient que l'accusé était coupable relativement à ce chef, et s'ils concluaient aussi que l'infraction reprochée dans l'affaire Blanchard était probablement le fait de la même personne, ils pouvaient utiliser cette preuve, en particulier celle de l'utilisation d'un instrument tranchant, pour confirmer ou appuyer les dépositions des autres témoins et la découverte de la bague et des fibres mauves. Le juge du procès a conclu son exposé en disant aux jurés de ne pas oublier qu'ils ne pouvaient pas reconnaître l'accusé coupable du meurtre de M^{me} Blanchard ou de celui de M^{me} Umphrey à moins d'être convaincus hors de tout doute raisonnable de sa culpabilité à l'égard des actes reprochés.

B. *Cour d'appel* (1997), 92 B.C.A.C. 286 (le juge Hinds au nom de la cour)

Devant la Cour d'appel, l'appelant a soutenu que l'exposé du juge du procès au sujet de la preuve de faits similaires était fondé sur l'arrêt *R. c. Simpson* (1977), 35 C.C.C. (2d) 337 (C.A. Ont.),

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followed in light of decisions from other courts of appeal that take a different approach. However, Hinds J.A. found that the *Simpson* decision was followed by the British Columbia Court of Appeal in *R. v. Lawson* (1994), 45 B.C.A.C. 14. *Lawson*, in turn, was referred to with approval in another British Columbia Court of Appeal decision, *R. v. Doan* (1996), 81 B.C.A.C. 192. In *Lawson*, the court held at p. 21 as follows:

Counsel for the appellant made two points.

The first was that the word “likely” used by the trial judge sets the wrong standard. He says that the standard in relation to the element of identity and the element of intent should be that at least those elements must be established beyond a reasonable doubt on the count that is said to be similar without resort to evidence outside that count before using the evidence on that count to help to prove intent or identity on the count actually being considered. By that he meant that at least one count must be proved beyond a reasonable doubt on the basis of evidence relating exclusively to that count. As counsel said “there must be at least one anchor”. In my opinion, that point is not in accordance with the authority of *R. v. Simpson* and I would not accede to it.

33 Hinds J.A. concluded that the present law in British Columbia on the use of similar fact evidence is set forth in *Lawson*, and is based on the principles in *Simpson*. He found that the trial judge’s charge was in conformity with those principles and followed the suggested wording set forth in G. Ferguson, *CRIMJI: Canadian Criminal Jury Instructions* (3rd ed. 1997 (loose-leaf)), vol. 1, 4.61. Furthermore, the trial judge’s instructions on the use to which the jury could put similar fact evidence complied with the principle expressed in *R. v. Morin*, [1988] 2 S.C.R. 345, at pp. 360-62, that the criminal standard of proof applies to the determination of the ultimate issue of guilt or innocence and not to individual items of evidence.

34 The appellant also argued that the hair samples given in 1990 should not have been used in a sub-

arrêt qui ne devrait pas être suivi parce qu’il existe des décisions d’autres cours d’appel ayant appliqué une approche différente. Cependant, le juge Hinds a conclu que l’arrêt *Simpson* avait été suivi par la Cour d’appel de la Colombie-Britannique dans *R. c. Lawson* (1994), 45 B.C.A.C. 14, arrêt qui, à son tour, a été mentionné avec approbation dans une autre décision de cette même cour: *R. c. Doan* (1996), 81 B.C.A.C. 192. Dans *Lawson*, la Cour d’appel a tiré la conclusion suivante, à la p. 21:

[TRADUCTION] L’avocat de l’appellant a invoqué deux arguments.

Le premier était que le mot «probablement» employé par le juge du procès fixe la mauvaise norme. Il affirme que la norme applicable à l’égard de l’identité et de l’intention devrait exiger que ces éléments au moins soient établis hors de tout doute raisonnable relativement au chef d’accusation que l’on prétend similaire sans recourir à des éléments de preuve étrangers à ce chef avant d’utiliser la preuve concernant ce chef pour aider à prouver l’intention ou l’identité relativement au chef d’accusation directement examiné. Il a voulu dire par là qu’au moins un chef d’accusation doit être prouvé hors de tout doute raisonnable sur la base de la preuve qui se rapporte exclusivement à ce chef. Comme a dit l’avocat: «il doit y avoir au moins un point d’ancrage». Selon moi, cet argument est incompatible avec l’autorité de l’arrêt *R. c. Simpson*, et je ne puis y souscrire.

Le juge Hinds a conclu que le droit en vigueur en Colombie-Britannique sur l’utilisation de la preuve de faits similaires est exposé dans l’arrêt *Lawson* et repose sur les principes énoncés dans l’arrêt *Simpson*. Il a conclu que l’exposé du juge du procès était conforme à ces principes et suivait le libellé suggéré dans G. Ferguson, *CRIMJI: Canadian Criminal Jury Instructions* (3^e éd. 1997 (feuilles mobiles)), vol. 1, 4.61. En outre, les directives du juge du procès sur l’utilisation que le jury pouvait faire de la preuve de faits similaires étaient compatibles avec le principe énoncé dans *R. c. Morin*, [1988] 2 R.C.S. 345, aux pp. 360 à 362, et suivant lequel la norme de preuve en matière criminelle s’applique à la décision finale en ce qui concerne la culpabilité ou l’innocence et non aux divers éléments de preuve pris isolément.

L’appellant a également plaidé que les échantillons de cheveux et de poils donnés en 1990 n’au-

sequent police investigation. The appellant contended that the subsequent use of the samples vitiated the consent given in 1990, and that the seizure of the samples therefore violated his rights under s. 8 of the *Charter*. He further contended that the DNA evidence should not have been admitted under s. 24(2) of the *Charter*. Hinds J.A. noted that this issue was left undecided by this Court in *R. v. Borden*, [1994] 3 S.C.R. 145. Counsel for the appellant argued that the effect of the police using the hair samples taken in July 1990 for the investigation of the Umphrey murder was to enable them to maintain a DNA bank. The government is specifically prohibited from maintaining DNA samples under the recent DNA legislation. See the *Code*, ss. 487.04 *et seq.*

Hinds J.A. disagreed with that submission. He felt that the legislation pertaining to the seizure of DNA material is not relevant to the use of those substances that a person willingly provides to the police. The appellant's scalp and pubic hairs had not been taken by force or threat of force and thus did not constitute conscripted evidence. The obtaining of the appellant's hair samples on July 26, 1990 did not violate his s. 8 rights. Thereafter, the samples remained in the custody and control of the RCMP. The appropriate time to determine whether the appellant's s. 8 rights were violated was on July 26, 1990, the date upon which the samples were obtained by the police.

Even if the appropriate date for the determination was March 16, 1993 when the samples were retrieved from the RCMP laboratory, the appellant's s. 8 rights were not violated. On March 16, 1993, the appellant had no reasonable expectation of privacy with respect to the hair samples and the police seized the samples in accordance with a val-

raient pas dû être utilisés dans une enquête policière subséquente. Il a affirmé que l'utilisation subséquente de ces échantillons a vicié le consentement donné en 1990, et que la saisie des échantillons avait en conséquence porté atteinte aux droits qui lui sont garantis par l'art. 8 de la *Charte*. L'appellant a en outre soutenu que, en application du par. 24(2) de la *Charte*, la preuve génétique n'aurait pas dû être admise. Le juge Hinds a fait remarquer que cette question avait été laissée sans réponse par notre Cour dans *R. c. Borden*, [1994] 3 R.C.S. 145. L'avocat de l'appellant a prétendu que l'utilisation par les policiers, dans le cadre de l'enquête sur le meurtre de M^{me} Umphrey, des échantillons de cheveux et de poils prélevés en juillet 1990 avait eu pour effet de leur permettre de conserver une banque d'ADN. Les récentes dispositions législatives sur l'ADN interdisent expressément au gouvernement de conserver des échantillons d'ADN. Voir les art. 487.04 et suiv. du *Code*.

Le juge Hinds n'a pas accepté cette prétention. Il a estimé que les dispositions législatives portant sur la saisie de matériel génétique ne visent pas l'utilisation de substances fournies volontairement aux autorités policières par une personne. Les cheveux et les poils pubiens de l'appellant n'avaient pas été prélevés par la force ou par la menace d'utilisation de la force, et ne constituaient donc pas une preuve obtenue en mobilisant l'accusé contre lui-même. L'obtention d'échantillons de cheveux et de poils de l'appellant le 26 juillet 1990 n'avait pas porté atteinte aux droits garantis à celui-ci par l'art. 8. Par la suite, les échantillons étaient demeurés sous la garde et la responsabilité de la GRC. La date pertinente pour décider si les droits de l'appellant garantis par l'art. 8 avaient été violés était le 26 juillet 1990, date à laquelle les policiers avaient obtenu les échantillons.

Même si la date pertinente avait été le 16 mars 1993, soit la date à laquelle les échantillons ont été saisis au laboratoire de la GRC, les droits garantis à l'appellant par l'art. 8 n'avaient pas été violés. Le 16 mars 1993, l'appellant n'avait aucune attente raisonnable en matière de respect de la vie privée à l'égard des échantillons de cheveux et de poils, et

idly issued search warrant. The appeal from conviction was dismissed.

III. Analysis

A. *Admissibility of Similar Fact Evidence*

1. Probative Value

³⁷ This appeal concerns the proper charge to a jury on the use of similar fact evidence. This issue necessarily requires a careful review of the role of the trial judge in considering the admission of similar fact evidence. This is necessary in order to place the function of the jury in weighing similar fact evidence in its proper context.

³⁸ The rule allowing for the admissibility of similar fact evidence is perhaps best viewed as an “exception to an exception” to the basic rule that all relevant evidence is admissible. Relevance depends directly on the facts in issue in any particular case. The facts in issue are in turn determined by the charge in the indictment and the defence, if any, raised by the accused. See *Koufis v. The King*, [1941] S.C.R. 481, at p. 490. To be logically relevant, an item of evidence does not have to firmly establish, on any standard, the truth or falsity of a fact in issue. The evidence must simply tend to “increase or diminish the probability of the existence of a fact in issue”. See Sir Richard Eggleston, *Evidence, Proof and Probability* (2nd ed. 1978), at p. 83. As a consequence, there is no minimum probative value required for evidence to be relevant. See *R. v. Morris*, [1983] 2 S.C.R. 190, at pp. 199-200.

³⁹ Evidence of propensity or disposition (e.g., evidence of prior bad acts) is relevant to the ultimate issue of guilt, in so far as the fact that a person has acted in a particular way in the past tends to support the inference that he or she has acted that way

les policiers avaient saisi les échantillons en vertu d’un mandat de perquisition décerné valablement. L’appel de la déclaration de culpabilité a été rejeté.

III. L’analyse

A. *L’admissibilité de la preuve de faits similaires*

1. La valeur probante

Le présent pourvoi porte sur les directives qu’il convient de donner au jury relativement à l’utilisation d’une preuve de faits similaires. Cette question exige forcément une analyse approfondie du rôle du juge du procès dans l’examen de la question de savoir si une telle preuve doit être admise. Cette analyse est nécessaire afin de bien situer dans son contexte le rôle du jury dans l’appréciation d’une preuve de faits similaires.

La meilleure façon de définir la règle autorisant l’admission d’une preuve de faits similaires serait peut-être de dire qu’il s’agit d’une «exception à une exception» à la règle fondamentale suivant laquelle tout élément de preuve pertinent est admissible. La pertinence dépend directement des faits en litige dans une affaire donnée. Pour leur part, les faits en litige sont déterminés par l’infraction reprochée dans l’acte d’accusation et par les moyens de défense, s’il en est, qui sont invoqués par l’accusé. Voir *Koufis c. The King*, [1941] R.C.S. 481, à la p. 490. Pour qu’un élément de preuve soit logiquement pertinent, il n’est pas nécessaire qu’il établisse fermement, selon quelque norme que ce soit, la véracité ou la fausseté d’un fait en litige. La preuve doit simplement tendre à [TRADUCTION] «accroître ou diminuer la probabilité de l’existence d’un fait en litige». Voir Sir Richard Eggleston, *Evidence, Proof and Probability* (2^e éd. 1978), à la p. 83. En conséquence, aucune valeur probante minimale n’est requise pour qu’un élément de preuve soit pertinent. Voir *R. c. Morris*, [1983] 2 R.C.S. 190, aux pp. 199 et 200.

La preuve d’une propension ou disposition (par exemple la preuve d’actes antérieurs répréhensibles) est pertinente pour trancher la question ultime, celle de la culpabilité ou de l’innocence, dans la mesure où le fait qu’une personne a agi

again. Though this evidence may often have little probative value, it is difficult to say it is not relevant. In this regard, I disagree in part with Lord Hailsham's judgment in *Director of Public Prosecutions v. Boardman*, [1975] A.C. 421. He wrote, at p. 451 that "[w]hen there is nothing to connect the accused with a particular crime except bad character or similar crimes committed in the past, the probative value of the evidence is nil and the evidence is rejected on that ground". I think this statement may go too far, and find the approach taken by Lamer J., as he then was, in *Morris*, *supra*, is more accurate. He stated, at p. 203:

Disposition the nature of which is of no relevance to the crime committed has no probative value and . . . for that reason excluded. But if relevant to the crime, even though there is nothing else connecting the accused to that crime, it is of some probative value, be it slight, and it should be excluded as inadmissible not as irrelevant. [Emphasis added.]

Thus evidence of propensity or disposition may be relevant to the crime charged, but it is usually inadmissible because its slight probative value is ultimately outweighed by its highly prejudicial effect. As Sopinka J. noted in *R. v. D. (L.E.)*, [1989] 2 S.C.R. 111, at pp. 127-28, there are three potential dangers associated with evidence of prior bad acts: (1) the jury may find that the accused is a "bad person" who is likely to be guilty of the offence charged; (2) they may punish the accused for past misconduct by finding the accused guilty of the offence charged; or (3) they may simply become confused by having their attention deflected from the main purpose of their deliberations, and substitute their verdict on another matter for their verdict on the charge being tried. Because of these very serious dangers to the accused, evidence of propensity or disposition is excluded as

d'une certaine manière dans le passé tend à appuyer l'inférence qu'elle a de nouveau agi de cette façon. Même si cette preuve n'a souvent qu'une faible valeur probante, il est difficile d'affirmer qu'elle n'est pas pertinente. À cet égard, je suis partiellement en désaccord avec le jugement de lord Hailsham dans *Director of Public Prosecutions c. Boardman*, [1975] A.C. 421, où ce dernier a écrit, à la p. 451, que [TRADUCTION] «[L]orsque rien ne rattache l'accusé à un crime particulier, si ce n'est une preuve de moralité douteuse ou de perpétration de crimes similaires dans le passé, une telle preuve n'a aucune valeur probante et est rejetée pour ce motif». À mon avis, cette affirmation va peut-être trop loin, et l'approche retenue par le juge Lamer, maintenant Juge en chef du Canada, dans *Morris*, précité, me paraît plus juste. Ce dernier a déclaré ceci, à la p. 203:

La propension, si elle ne se rapporte pas au crime perpétré, n'a aucune valeur probante; [. . .] et doit pour cette raison être exclue. Mais si la propension se rapporte au crime, même en l'absence de tout autre lien entre l'accusé et ce crime, elle a une certaine valeur probante, si minime soit-elle, et elle doit être exclue parce qu'elle est inadmissible et non parce qu'elle n'est pas pertinente. [Je souligne.]

Par conséquent, la preuve d'une propension ou disposition peut être pertinente à l'égard du crime reproché, mais elle est généralement inadmissible parce que, en dernière analyse, son effet très préjudiciable l'emporte sur sa faible valeur probante. Comme l'a souligné le juge Sopinka dans *R. c. D. (L.E.)*, [1989] 2 R.C.S. 111, aux pp. 127 et 128, une preuve d'actes antérieurs répréhensibles comporte trois dangers potentiels: (1) le jury peut conclure que l'accusé est une «mauvaise personne» qui est vraisemblablement coupable de l'infraction qu'on lui reproche; (2) le jury peut punir l'accusé pour son inconduite antérieure en le déclarant coupable de l'infraction qui lui est imputée; (3) le jury peut tout simplement s'embrouiller parce que son attention se trouve détournée de l'objet premier de ses délibérations, et substituer son verdict sur une autre question à un verdict sur la question qu'il est appelé à juger. Comme il s'agit de dangers très réels pour l'accusé, la preuve d'une propension ou

an exception to the general rule that all relevant evidence is admissible.

disposition est écartée en tant qu'exception à la règle générale suivant laquelle tout élément de preuve pertinent est admissible.

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However, as Lord Hailsham stated in *Boardman*, *supra*, at p. 453, "what is *not* to be admitted is a chain of reasoning and not necessarily a state of facts" (emphasis added). That is, disposition evidence which is adduced solely to invite the jury to find the accused guilty because of his or her past immoral conduct is inadmissible. However, evidence of similar past misconduct may exceptionally be admitted where the prohibited line of reasoning may be avoided. In *R. v. B. (C.R.)*, [1990] 1 S.C.R. 717, McLachlin J. writing for the majority carefully reviewed the issue of similar fact evidence. She reviewed the reasoning put forward in *Boardman*, *supra*, and, at p. 730 observed:

This view of similar fact evidence posits a test which is related to, yet distinct from the general rule that evidence is not admissible if its prejudicial effect outweighs its probative value: see *R. v. Wray*, [1971] S.C.R. 272. That rule is an exclusionary rule applied to evidence which would otherwise be admissible. The reverse is the case with similar fact evidence. In determining its admissibility, one starts from the proposition that the evidence is inadmissible, given the low degree of probative force and the high degree of prejudice typically associated with it. The question then is whether, because of the exceptional probative value of the evidence under consideration in relation to its potential prejudice, it should be admitted notwithstanding the general exclusionary rule.

After a review of the other pertinent authorities she concluded at pp. 734-35:

This review of the jurisprudence leads me to the following conclusions as to the law of similar fact evidence as it now stands in Canada. The analysis of whether the evidence in question is admissible must begin with the recognition of the general exclusionary rule against evidence going merely to disposition. As affirmed in *Boardman* and reiterated by this Court in *Guay*, *Cloutier*, *Morris*, *Morin* and *D. (L.E.)*, evidence which is adduced solely to show that the accused is the sort of

Toutefois, comme a déclaré lord Hailsham dans *Boardman*, précité, à la p. 453, [TRADUCTION] «ce qui *ne doit pas* être admis est un raisonnement, pas nécessairement un état de faits» (en italique dans l'original). En d'autres mots, est inadmissible la preuve d'une propension ou disposition qui est produite dans le seul but d'inviter le jury à déclarer l'accusé coupable sur le fondement de sa conduite immorale antérieure. Toutefois, la preuve d'une inconduite antérieure similaire peut exceptionnellement être admise lorsque le raisonnement interdit peut être évité. Dans *R. c. B. (C.R.)*, [1990] 1 R.C.S. 717, le juge McLachlin, qui s'exprimait au nom des juges majoritaires, a soigneusement examiné la question de la preuve de faits similaires. Après avoir analysé le raisonnement fait dans *Boardman*, précité, elle a fait les observations suivantes, à la p. 730:

Cette conception de la preuve de faits similaires propose un critère qui se rapporte à la règle générale, bien qu'il en soit distinct, selon laquelle la preuve est inadmissible si son effet préjudiciable l'emporte sur sa valeur probante: voir l'arrêt *R. c. Wray*, [1971] R.C.S. 272. Il s'agit d'une règle d'exclusion applicable à la preuve qui serait par ailleurs admissible. C'est l'inverse pour la preuve de faits similaires. Pour déterminer son admissibilité, il faut partir du principe que la preuve est inadmissible étant donné la faible force probante et l'importance du préjudice qui y est généralement associé. Il faut se demander ensuite si, en raison de la valeur probante exceptionnelle de la preuve examinée par rapport au préjudice qu'elle est susceptible de causer, elle devrait être admise sans égard à la règle générale d'exclusion.

Après avoir examiné les autres décisions pertinentes, elle a dit ceci, aux pp. 734 et 735:

Cet examen de la jurisprudence m'amène à tirer les conclusions suivantes quant à l'état actuel du droit en matière de preuve de faits similaires au Canada. Pour déterminer si la preuve en question est admissible, il faut d'abord reconnaître la règle générale d'exclusion de la preuve qui ne tend qu'à établir la propension. Comme le dit l'arrêt *Boardman* et comme notre Cour l'a répété dans les arrêts *Guay*, *Cloutier*, *Morris*, *Morin* et *D. (L.E.)*, la preuve présentée dans le seul but d'établir que

person likely to have committed an offence is, as a rule, inadmissible. Whether the evidence in question constitutes an exception to this general rule depends on whether the probative value of the proposed evidence outweighs its prejudicial effect. In a case such as the present, where the similar fact evidence sought to be adduced is prosecution evidence of a morally repugnant act committed by the accused, the potential prejudice is great and the probative value of the evidence must be high indeed to permit its reception. The judge must consider such factors as the degree of distinctiveness or uniqueness between the similar fact evidence and the offences alleged against the accused, as well as the connection, if any, of the evidence to issues other than propensity, to the end of determining whether, in the context of the case before him, the probative value of the evidence outweighs its potential prejudice and justifies its reception.

It can be seen that in considering whether similar fact evidence should be admitted the basic and fundamental question that must be determined is whether the probative value of the evidence outweighs its prejudicial effect. As well it must be remembered that a high degree of deference must be given to the decision of a trial judge on this issue. See *B. (C.R.)*, *supra*, at pp. 732-33.

It follows that where identity is at issue in a criminal case and the accused is shown to have committed acts which bear a striking similarity to the alleged crime, the jury is not asked to infer from the accused's habits or disposition that he is the type of person who would commit the crime. Instead, the jury is asked to infer from the degree of distinctiveness or uniqueness that exists between the commission of the crime and the similar act that the accused is the very person who committed the crime. This inference is made possible only if the high degree of similarity between the acts renders the likelihood of coincidence objectively improbable. See *Hoch v. The Queen* (1988), 165 C.L.R. 292 (Aust. H.C.). That is, there is always a possibility that by coincidence the perpetrator of the crime and the accused share certain predilections or that the accused may become implicated in crimes for which he is not responsible. However, where the evidence shows a distinct pattern to the acts in question, the possibility that

l'accusé est le genre de personne susceptible d'avoir commis une infraction, est en principe inadmissible. La question de savoir si la preuve en question constitue une exception à cette règle générale dépend de savoir si la valeur probante de la preuve présentée l'emporte sur son effet préjudiciable. Dans un cas comme celui-ci, où la preuve de faits similaires que l'on veut présenter est une preuve à charge d'un acte moralement répugnant commis par l'accusé, le préjudice qui peut en résulter est grave et la valeur probante de la preuve doit vraiment être grande pour permettre sa réception. Le juge doit considérer des facteurs comme le degré de particularisme marquant à la fois les faits similaires et les infractions reprochées à l'accusé ainsi que le rapport, s'il en est, entre la preuve et les questions autres que la propension, afin de déterminer si, compte tenu des circonstances de l'espèce, la valeur probante de la preuve l'emporte sur le préjudice potentiel et justifie sa réception.

On constate que, pour décider si une preuve de faits similaires doit être déclarée admissible, la question fondamentale qui doit être tranchée est de savoir si la valeur probante de cette preuve l'emporte sur son effet préjudiciable. De même, il convient de se rappeler qu'il faut accorder un respect considérable à la décision du juge du procès sur cette question. Voir *B. (C.R.)*, précité, aux pp. 732 et 733.

Il s'ensuit que, lorsque l'identité est un point litigieux dans une affaire criminelle et qu'il est démontré que l'accusé a commis des actes présentant des similitudes frappantes avec le crime reproché, le jury n'est pas invité à inférer des habitudes ou de la disposition de l'accusé qu'il est le genre de personne qui commettrait ce crime. Au contraire, le jury est plutôt invité à inférer du degré de particularité ou de singularité qui existe entre le crime perpétré et l'acte similaire que l'accusé est la personne même qui a commis le crime. Cette inférence n'est possible que si le haut degré de similitude entre les actes rend une coïncidence objectivement improbable. Voir *Hoch c. The Queen* (1988), 165 C.L.R. 292 (H.C. Aust.). En d'autres termes, il est toujours possible que, par le jeu d'une coïncidence, l'auteur du crime et l'accusé partagent certaines prédilections, ou encore que l'accusé puisse devenir impliqué dans des crimes dont il n'est pas responsable. Toutefois, lorsque la preuve révèle une manière distincte de commettre

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the accused would repeatedly be implicated in strikingly similar offences purely as a matter of coincidence is greatly reduced. Sopinka J. in *Morin*, *supra*, where similar fact evidence was used to prove identity, made this point clear (at p. 367):

In similar fact cases it is not sufficient to establish that the accused is a member of an abnormal group with the same propensities as the perpetrator. There must be some further distinguishing feature. Accordingly, if the crime was committed by someone with homosexual tendencies, it is not sufficient to establish that the accused is a practising homosexual or indeed has engaged in numerous homosexual acts. The tendered evidence must tend to show that there was some striking similarity between the manner in which the perpetrator committed the criminal act and such evidence.

See also *R. v. Scopelliti* (1981), 63 C.C.C. (2d) 481 (Ont. C.A.), at p. 496, *per* Martin J.A. (evidence of propensity is not admissible “unless the propensity is so highly distinctive or unique as to constitute a signature”).

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Because similar fact evidence is admitted on the basis of an objective improbability of coincidence, the evidence necessarily derives its probative value from the degree of similarity between the acts under consideration. The probative value must, of course, significantly outweigh the prejudice to the accused for the evidence to be admissible. See *B. (C.R.)*, *supra*. However, the majority in *B. (C.R.)*, at pp. 732-33, rejected the proposition that the evidence must show a “striking similarity” between the acts in question in order for the evidence to have the requisite probative value. I agree that the requirement of “striking similarity” needs to be qualified. This point is carefully made in *R. v. P.*, [1991] 3 All E.R. 337 (H.L.), where the accused was charged with the rape of both his daughters and with committing incest with them. The counts were tried together, and the evidence of both daughters was admitted in relation to each count to prove the commission of the crime (at p. 348):

When a question of the kind raised in this case arises I consider that the judge must first decide whether there

les actes en question, la possibilité que, par pure coïncidence, l'accusé soit à plusieurs reprises impliqué dans des infractions très similaires s'en trouve de beaucoup réduite. Ce point a été clairement exprimé par le juge Sopinka, dans *Morin*, précité, où une preuve de faits similaires avait été utilisée pour établir l'identité (à la p. 367):

Dans les affaires de faits similaires, il ne suffit pas d'établir que l'accusé fait partie d'un groupe anormal qui a les mêmes propensions que l'auteur du crime. Il doit y avoir d'autres caractéristiques distinctives. Par conséquent, si le crime a été commis par quelqu'un qui a des tendances homosexuelles, il ne suffit pas d'établir que l'accusé est un homosexuel actif ni même qu'il a pratiqué de nombreux actes homosexuels. La preuve offerte doit tendre à démontrer qu'il y a des similitudes frappantes entre la manière dont l'auteur du crime a commis l'acte criminel et cette preuve.

Voir aussi *R. c. Scopelliti* (1981), 63 C.C.C. (2d) 481 (C.A. Ont.), à la p. 496, le juge Martin, (la preuve de la propension n'est pas admissible, [TRADUCTION] «à moins que la propension soit tellement distinctive ou singulière qu'elle constitue une signature»).

Comme une preuve de faits similaires est admise parce qu'une coïncidence est objectivement improbable, la valeur probante de cette preuve découle forcément du degré de similitude entre les actes examinés. Évidemment, il faut que cette valeur probante l'emporte de façon nette sur le préjudice causé à l'accusé pour que la preuve en question soit admissible. Voir *B. (C.R.)*, précité. Cependant, dans *B. (C.R.)*, aux pp. 732 et 733, la majorité a rejeté la thèse voulant que la preuve doive révéler une «similitude frappante» entre les actes en question pour posséder la valeur probante requise. J'admets que l'exigence de «similitudes frappantes» doit être tempérée. Ce point est soigneusement exposé dans *R. c. P.*, [1991] 3 All E.R. 337 (H.L.). Dans cette affaire, l'accusé avait été inculpé du viol de ses deux filles ainsi que d'inceste à leur endroit. Les accusations ont été instruites ensemble et le témoignage des deux filles a été admis relativement à chaque chef pour prouver la perpétration du crime (à la p. 348):

[TRADUCTION] Quand une question semblable à celle qui est soulevée en l'espèce se pose, j'estime que le juge

is material upon which the jury would be entitled to conclude that the evidence of one victim, about what occurred to that victim, is so related to the evidence given by another victim, about what happened to that other victim, that the evidence of the first victim provides strong enough support for the evidence of the second victim to make it just to admit it, notwithstanding the prejudicial effect of admitting the evidence. This relationship, from which support is derived, may take many forms and while these forms may include 'striking similarity' in the manner in which the crime is committed, . . . the necessary relationship is by no means confined to such circumstances. Relationships in time and circumstances other than these may well be important relationships in this connection. Where the identity of the perpetrator is in issue, and evidence of this kind is important in that connection, obviously something in the nature of what has been called in the course of the argument a signature or other special feature will be necessary. To transpose this requirement to other situations where the question is whether a crime has been committed, rather than who did commit it, is to impose an unnecessary and improper restriction upon the application of the principle. [Emphasis added.]

Since the evidence of both girls described a prolonged course of conduct involving the use of force and general domination, the circumstances, taken together, gave strong probative force to the evidence of one in respect of the other, notwithstanding that the manner of the commission of the alleged crimes did not disclose a "striking similarity".

Instead, a principled approach to the admission of similar fact evidence will in all cases rest on the finding that the accused's involvement in the alleged similar acts or counts is unlikely to be the product of coincidence. This conclusion ensures that the evidence has sufficient probative force to be admitted, and will involve different considerations in different contexts. Where, as here, similar fact evidence is adduced on the issue of identity, there must be a high degree of similarity between the acts for the evidence to be admitted. For example, a unique trademark or signature will automatically render the alleged acts "strikingly similar" and therefore highly probative and admissible. In the same way, a number of significant similarities,

doit d'abord décider s'il existe des éléments qui autoriseraient le jury à conclure que le témoignage d'une victime sur ce qui lui est arrivée est tellement lié au témoignage d'une autre victime sur ce qui est arrivé à cette dernière que le témoignage de la première victime appuie suffisamment le témoignage de la seconde victime pour qu'il soit juste de l'admettre, malgré l'effet préjudiciable de l'admission du témoignage. Le lien dont découle cet appui peut prendre de nombreuses formes et, quoiqu'une de ces formes puisse être une «similitude frappante» quant à la façon dont le crime a été commis, [. . .] ce lien indispensable n'est en aucune façon limité à de telles circonstances. Des liens dans le temps et les circonstances — autres que celles qui viennent d'être évoquées — peuvent fort bien constituer des liens importants à cet égard. Lorsque l'identité de l'accusé est en cause et que des témoignages de ce genre sont importants à cet égard, il est évident qu'il faudra quelque chose qui ressemble à ce qu'on a appelé au cours des débats une signature ou une autre caractéristique spéciale. Transposer cette exigence à d'autres situations dans lesquelles la question consiste à déterminer si un crime a été commis plutôt que l'identité de son auteur revient à imposer une restriction inutile et inappropriée à l'application de ce principe. [Je souligne.]

Comme les témoignages des deux filles décrivaient une conduite qui s'était étendue sur une longue période et qui avait comporté l'utilisation de la force et l'exercice d'une domination générale, les circonstances, considérées ensemble, donnaient une forte valeur probante au témoignage de l'une par rapport à celui de l'autre, malgré le fait que la manière dont les crimes reprochés avaient été commis ne révélait pas une «similitude frappante».

Au lieu de cela, l'application d'une approche fondée sur des principes pour statuer sur l'admissibilité d'une preuve de faits similaires reposera dans tous les cas sur la conclusion qu'il est improbable que l'implication de l'accusé dans les faits similaires ou chefs d'accusation reprochés soit le fruit d'une coïncidence. Une telle conclusion assure que la preuve a une valeur probante suffisante pour être admise, et elle fera intervenir différentes considérations dans différents contextes. Lorsque, comme c'est le cas en l'espèce, une preuve de faits similaires est produite à l'égard de la question de l'identité, il doit exister un haut degré de similitude entre les faits pour que la preuve soit admise. Par exemple, la présence d'une

taken together, may be such that by their cumulative effect, they warrant admission of the evidence. Where identity is at issue ordinarily, the trial judge should review the manner in which the similar acts were committed — that is to say, whether the similar acts involve a unique trademark or reveal a number of significant similarities. This review will enable him or her to decide whether the alleged similar acts were all committed by the same person. This preliminary determination establishes the objective improbability that the accused's involvement in the alleged acts is the product of coincidence and thereby gives the evidence the requisite probative force. Thus, where the similar fact evidence is adduced to prove identity, once this preliminary determination is made, the evidence related to the similar act (or count, in a multi-count indictment) may be admitted to prove the commission of another act (or count).

marque ou signature singulière donnera automatiquement aux faits reprochés une «similitude frappante» et les rendra, par conséquent, extrêmement probants et admissibles. De même, il est possible que, considérées ensemble, un certain nombre de similitudes importantes soient telles que leur effet cumulatif justifie l'admission de la preuve. Ordinairement, lorsque la question de l'identité est en litige, le juge du procès devrait examiner la façon dont les actes similaires ont été commis — c'est-à-dire examiner si ces actes laissent voir une marque singulière ou révèlent un certain nombre de similitudes importantes. Cet examen lui permettra de déterminer si les faits similaires reprochés ont tous été commis par la même personne. Cette constatation préliminaire établit l'improbabilité objective que l'implication de l'accusé dans les actes reprochés soit le fruit d'une coïncidence et confère ainsi à la preuve la force probante requise. En conséquence, lorsqu'une preuve de faits similaires est produite pour établir l'identité, une fois cette constatation préliminaire faite, les éléments de preuve relatifs à l'acte similaire (ou au chef d'accusation, dans un acte d'accusation comportant plusieurs chefs) peuvent être admis pour prouver la perpétration d'un autre acte (ou chef d'accusation).

⁴⁶ By way of summary, McLachlin J.'s statement of the law relating to the admissibility of similar fact evidence in *R. v. C. (M.H.)*, [1991] 1 S.C.R. 763, is apt. She put the proposition with great clarity, at pp. 771-72:

Such evidence is likely to have a severe prejudicial effect by inducing the jury to think of the accused as a "bad" person. At the same time it possesses little relevance to the real issue, namely, whether the accused committed the particular offence with which he stands charged. There will be occasions, however, where the similar act evidence will go to more than disposition, and will be considered to have real probative value. That probative value usually arises from the fact that the acts compared are so unusual and strikingly similar that their similarities cannot be attributed to coincidence. Only where the probative force clearly outweighs the prejudice, or the danger that the jury may convict for non-logical reasons, should such evidence be received.

En résumé, dans *R. c. C. (M.H.)*, [1991] 1 R.C.S. 763, le juge McLachlin a énoncé avec justesse le droit relatif à l'admissibilité d'une preuve de faits similaires. Elle a exposé très clairement ces principes aux pp. 771 et 772:

Cette preuve est susceptible d'avoir un grave effet préjudiciable en amenant le jury à penser que l'accusé est une «mauvaise» personne. En même temps, elle est d'une pertinence limitée relativement à la vraie question, celle de savoir si l'accusé a commis l'infraction particulière dont il est inculpé. Il y aura des cas, cependant, où la preuve d'actes similaires touchera à autre chose que la disposition et sera considérée comme ayant une véritable valeur probante. Cette valeur probante tient ordinairement au fait que les actes comparés sont à ce point inhabituels et présentent des similitudes à ce point frappantes que ces similitudes ne peuvent pas être attribuées à une coïncidence. Cette preuve ne devrait être utilisée que lorsque la force probante l'emporte nettement sur le préjudice, ou sur le danger que le jury rende un verdict de culpabilité pour des raisons illogiques.

C. (M.H.), *supra*, left open the issue as to the standard of proof which should be applied by the trial judge where similar fact evidence is adduced to prove identity. In this regard, it must be remembered that the admissibility of similar fact evidence involves an analysis not normally undertaken by a trial judge. As a general rule, a trial judge will admit evidence shown to be relevant, and will not engage in an evaluation of the probative value or weight of the evidence. If the trial judge is called on to make a preliminary finding of fact as a precondition to admissibility, this finding is usually unrelated to the quality or reliability of the evidence itself. See *R. v. Egger*, [1993] 2 S.C.R. 451, at p. 474. Indeed, the judge must refrain from evaluating the quality, weight or reliability of evidence when determining admissibility since the weight to be given to evidence is properly the province of the jury. See *R. v. Charemski*, [1998] 1 S.C.R. 679. However, in determining the admissibility of similar fact evidence the trial judge must, to a certain extent, invade this province. As Professor Smith stated in *Case and Comment on R. v. Hurren*, [1962] *Crim. L. Rev.* 770, at p. 771:

It should be noted that judges commonly distinguish facts as going to weight rather than admissibility (see, e.g., *R. v. Wyatt*); but it is submitted that, as regards similar fact evidence, no sharp line can be drawn and that admissibility depends on weight.

Thus, where similar fact evidence is adduced to prove a fact in issue, in order to be admissible, the trial judge should evaluate the degree of similarity of the alleged acts and decide whether the objective improbability of coincidence has been established. Only then will the evidence have sufficient probative value to be admitted. Where the fact in issue is the identity of the perpetrator of the crime, then in the usual course of events the trial judge must assess the degree of similarity demonstrated by the manner in which the acts in question were committed to determine whether it is likely the same person committed the alleged similar acts.

L'arrêt *C. (M.H.)*, précité, n'a pas tranché la question de la norme de preuve qui devrait être appliquée par le juge du procès dans les cas où une preuve de faits similaires est produite pour établir l'identité. À cet égard, il ne faut pas oublier que l'admissibilité d'une preuve de faits similaires demande une analyse que le juge du procès ne fait pas en temps normal. En règle générale, le juge du procès admet un élément de preuve dont la pertinence est établie, et il n'évalue pas le poids ou valeur probante de cet élément. Si le juge du procès est appelé à tirer une conclusion de fait préliminaire en tant que condition préalable à l'admissibilité, cette conclusion n'a habituellement pas de lien avec la qualité ou la fiabilité de l'élément de preuve lui-même. Voir *R. c. Egger*, [1993] 2 R.C.S. 451, à la p. 474. De fait, le juge doit s'abstenir d'évaluer la qualité, le poids ou la fiabilité de l'élément de preuve lorsqu'il décide de son admissibilité, puisque le poids qu'il convient de lui accorder relève de la compétence du jury. Voir *R. c. Charemski*, [1998] 1 R.C.S. 679. Toutefois, pour décider de l'admissibilité d'une preuve de faits similaires, le juge du procès doit, dans une certaine mesure, empiéter sur cette compétence. Comme a dit le professeur Smith dans *Case and Comment on R. c. Hurren*, [1962] *Crim. L. Rev.* 770, à la p. 771:

[TRADUCTION] Il convient de souligner que les juges font habituellement une distinction entre les faits qui se rapportent au poids plutôt qu'à l'admissibilité (voir, par exemple, *R. c. Wyatt*); mais nous soumettons que, pour ce qui est de la preuve de faits similaires, il n'est pas possible de tracer une ligne de démarcation nette, et l'admissibilité dépend du poids.

En conséquence, lorsqu'une preuve de faits similaires est produite pour prouver un fait en litige, pour décider de son admissibilité le juge du procès doit apprécier le degré de similitude des faits reprochés et déterminer si l'improbabilité objective d'une coïncidence a été établie. Ce n'est que dans ce cas que la preuve aura une valeur probante suffisante pour être admissible. Lorsque le fait en litige est l'identité de l'auteur du crime, alors, dans le cours normal des choses, le juge du procès doit apprécier le degré de similitude qui ressort de la façon dont les actes en cause ont été commis pour déterminer s'il est probable que les

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Once it is determined on a balance of probabilities that the same person committed the alleged similar acts, the similar fact evidence may be admitted to prove that the accused committed the offence or offences in question.

actes similaires reprochés ont été commis par la même personne. Une fois qu'il a été établi, selon la prépondérance des probabilités, que les actes similaires reprochés ont été commis par la même personne, la preuve de faits similaires peut être admise pour établir que l'accusé a commis l'infraction ou les infractions en question.

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In determining whether similar fact evidence should be admitted to prove identity, the trial judge must have regard to the manner in which the alleged similar acts were committed. In general, evidence linking the accused to each alleged similar act should not be part of this evaluation. As Peter K. McWilliams, states in *Canadian Criminal Evidence* (3rd ed. 1988 (loose-leaf)), at p. 11-26.1, "[t]he link [to the accused] . . . is distinct from the link or *nexus* . . . which goes to the nature of the act and relates to its similarity or relevancy which is such as to overcome the general exclusionary rule" (emphasis in original). This distinction is made clear in Case and Comment on *R. v. Brown, Wilson, McMillan and McClean*, [1997] *Crim. L. Rev.* 502, at p. 503 (as reported by Richard Percival):

... There was evidence of striking similarities between the two groups of offences, and there was a signature or other special feature. . . . Once there was this link between the groups of offences, then evidence that linked a defendant with each group of offences was admissible against him on the other group. [Emphasis added.]

See also *R. v. Barnes*, [1995] 2 Cr. App. R. 491 (C.A.), at pp. 496-98. In other words, the similarity of the acts indicates whether one person committed the crimes; in most cases, evidence as to the accused's connection to each similar act indicates whether the accused committed the crimes. Only after the trial judge has considered the manner of the commission of the similar acts and is satisfied that there is evidence which could lead the jury to conclude that all the acts were committed by one person should he or she admit the evidence related to each act for the jury's consideration, including the evidence of the accused's involvement in each similar act.

Afin de décider si une preuve de faits similaires doit être admise pour établir l'identité, le juge du procès doit tenir compte de la manière dont les actes similaires allégués ont été commis. En général, la preuve qui lie l'accusé à chaque acte similaire reproché ne devrait pas faire partie de cette évaluation. Comme le dit Peter K. McWilliams dans *Canadian Criminal Evidence* (3^e éd. 1988 (feuilles mobiles)), à la p. 11-26.1, [TRADUCTION] «[l]e lien [avec l'accusé] [. . .] est distinct du lien ou de la *connexion* [. . .] qui touche à la nature de l'acte et se rapporte à sa similitude ou à sa pertinence qui doit être telle qu'elle écarte la règle générale d'exclusion» (en italique dans l'original). Cette distinction est clairement indiquée dans Case and Comment on *R. c. Brown, Wilson, McMillan and McClean*, [1997] *Crim. L. Rev.* 502, à la p. 503 (sommaire de Richard Percival):

[TRADUCTION] . . . La preuve révélait des similitudes frappantes entre les deux groupes d'infractions, et il existait une signature ou autre caractéristique spéciale. [. . .] Une fois établi ce lien entre les groupes d'infractions, alors la preuve qui liait un défendeur à chaque groupe d'infractions était admissible contre lui relativement à l'autre groupe. [Je souligne.]

Voir aussi *R. c. Barnes*, [1995] 2 Cr. App. R. 491 (C.A.), aux pp. 496 à 498. Autrement dit, la similitude des actes indique si une seule et même personne a commis les crimes; dans la plupart des cas, la preuve relative au lien entre l'accusé et chaque acte similaire indique si l'accusé a commis les crimes. Ce n'est qu'après que le juge du procès a examiné la façon dont les actes similaires ont été commis et qu'il est convaincu de l'existence d'éléments de preuve qui pourraient amener le jury à conclure que tous les actes ont été commis par une seule et même personne qu'il doit admettre la preuve se rapportant à chaque acte et la soumettre au jury, y compris la preuve de la participation de l'accusé à la perpétration de chaque acte similaire.

In summary, in considering the admissibility of similar fact evidence, the basic rule is that the trial judge must first determine whether the probative value of the evidence outweighs its prejudicial effect. In most cases where similar fact evidence is adduced to prove identity it might be helpful for the trial judge to consider the following suggestions in deciding whether to admit the evidence:

(1) Generally where similar fact evidence is adduced to prove identity a high degree of similarity between the acts is required in order to ensure that the similar fact evidence has the requisite probative value of outweighing its prejudicial effect to be admissible. The similarity between the acts may consist of a unique trademark or signature on a series of significant similarities.

(2) In assessing the similarity of the acts, the trial judge should only consider the manner in which the acts were committed and not the evidence as to the accused's involvement in each act.

(3) There may well be exceptions but as a general rule if there is such a degree of similarity between the acts that it is likely that they were committed by the same person then the similar fact evidence will ordinarily have sufficient probative force to outweigh its prejudicial effect and may be admitted.

(4) The jury will then be able to consider all the evidence related to the alleged similar acts in determining the accused's guilt for any one act.

Once again these are put forward not as rigid rules but simply as suggestions that may assist trial judges in their approach to similar fact evidence.

The test for admissibility of similar fact evidence adduced to prove identity is the same

En résumé, dans l'examen de la question de l'admissibilité d'une preuve de faits similaires, la règle fondamentale est que le juge du procès doit d'abord décider si la valeur probante de cette preuve l'emporte sur son effet préjudiciable. Dans la plupart des cas où une preuve de faits similaires est produite pour établir l'identité, il pourrait être utile au juge du procès de prendre en considération les suggestions suivantes lorsqu'il décide si la preuve doit être admise:

(1) En règle générale lorsqu'une preuve de faits similaires est produite pour prouver l'identité, un degré élevé de similitude doit exister entre les actes pour faire en sorte que cette preuve ait une valeur probante qui l'emporte sur son effet préjudiciable, conformément à ce qui est requis pour qu'elle soit admissible. La similitude entre les actes peut consister en une marque ou signature singulière caractérisant une série de similitudes importantes.

(2) Dans l'appréciation de la similitude des actes, le juge du procès devrait uniquement examiner la façon dont les actes ont été commis et non la preuve relative à la participation de l'accusé à chaque acte.

(3) Il est bien possible qu'il y ait des exceptions, mais en règle générale s'il existe entre les actes un degré de similitude tel qu'il est probable que ces derniers ont été commis par la même personne, la preuve de faits similaires aura ordinairement une force probante suffisante pour l'emporter sur son effet préjudiciable et elle peut être admise.

(4) Le jury sera alors en mesure d'examiner toute la preuve relative aux faits qui, prétend-on, sont similaires pour déterminer si l'accusé est coupable d'avoir commis l'un ou l'autre des actes.

Les observations qui précèdent sont faites, répétons-le, non pas en tant que règles rigides, mais simplement en tant que suggestions susceptibles d'aider les juges qui président des procès dans leur façon d'aborder une preuve de faits similaires.

Le critère d'admissibilité d'une preuve de faits similaires produite pour prouver l'identité est le

whether the alleged similar acts are definitively attributed to the accused, or are the subject of a multi-count indictment against the accused. See *Boardman*, *supra*, at p. 896, *per* Lord Wilberforce.

même, que les actes similaires allégués soient définitivement attribués à l'accusé ou qu'ils fassent l'objet d'un acte d'accusation reprochant plusieurs chefs d'accusation à l'accusé. Voir *Boardman*, précité, à la p. 896, lord Wilberforce.

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However, where the similar acts are alleged as part of a multi-count indictment, the consideration of the admissibility of similar fact evidence will have to be taken into account in deciding whether the counts should be severed. Nevertheless, the trial judge should be careful not to confuse admissibility with severance. A motion to sever under s. 591(3)(a) of the *Code* must be brought by the accused, who bears the burden of establishing on a balance of probabilities that the interests of justice require an order for severance. Yet the burden of demonstrating that similar fact evidence should be admitted must be borne by the Crown. These respective burdens may involve the consideration of similar factors, but as Lord Scarman noted in *R. v. Scarrott* (1977), 65 Cr. App. R. 125 (C.A.), at p. 135, "[i]t does not follow that because a multi-count indictment has been allowed to proceed that therefore the evidence given will be evidence on all the counts contained in the indictment". Thus, to paraphrase the Manitoba Court of Appeal in *R. v. Khan* (1996), 49 C.R. (4th) 160, at p. 167, notwithstanding the trial judge's refusal to sever the counts in a multi-count indictment, it remains open to him or her, as the evidence progresses at trial, to determine as a matter of law that evidence on one count is not admissible as similar fact evidence on the other counts. The assessment of similar fact evidence and the determination of its probative value and admissibility places on onerous burden on the trial judge. It is a task that must be undertaken with great care.

Toutefois, lorsque les actes similaires allégués font partie d'un acte d'accusation reprochant plusieurs chefs, la question de l'admissibilité d'une preuve de faits similaires devra être prise en considération pour décider s'il convient de séparer les chefs d'accusation. Néanmoins, le juge du procès devrait prendre soin de ne pas confondre la question de l'admissibilité et celle de la séparation des chefs d'accusation. Une requête sollicitant la tenue de procès distincts fondée sur l'al. 591(3)a) du *Code* doit être présentée par l'accusé, lequel a alors le fardeau d'établir, selon la prépondérance des probabilités, que les intérêts de la justice exigent une ordonnance en ce sens. Cependant, c'est au ministère public qu'il appartient de démontrer que la preuve de faits similaires devrait être admise. Ces fardeaux respectifs peuvent entraîner l'examen de facteurs similaires, mais comme l'a souligné lord Scarman dans l'arrêt *R. c. Scarrott* (1977), 65 Cr. App. R. 125 (C.A.), à la p. 135, [TRADUCTION] «[c]e n'est pas parce qu'on a permis qu'un acte d'accusation comportant plusieurs chefs d'accusation reste intact qu'il sera, de ce fait, présenté des éléments de preuve à l'égard de tous les chefs reprochés dans l'acte». Par conséquent, pour paraphraser la Cour d'appel du Manitoba dans *R. c. Khan* (1996), 49 C.R. (4th) 160, à la p. 167, même si le juge du procès refuse d'ordonner la tenue de procès distincts sur les divers chefs reprochés dans un acte d'accusation, rien ne l'empêche, au fur et à mesure de la présentation de la preuve au procès, de décider, en tant que question de droit, que la preuve relative à un chef d'accusation n'est pas admissible comme preuve de faits similaires à l'égard des autres chefs d'accusation. L'appréciation d'une preuve de faits similaires et la détermination de sa valeur probante et de son admissibilité imposent au juge du procès une lourde tâche, tâche qui doit être accomplie avec beaucoup de soin.

2. Link to the Accused

Where the similar fact evidence adduced to prove identity suggests that the same person committed the similar acts, then logically this finding makes the evidence linking the accused to each similar act relevant to the issue of identity for the offence being tried. Similarly, in a multi-count indictment, the link between the accused and any one count will be relevant to the issue of identity on the other counts which disclose a striking similarity in the manner in which those offences were committed.

A link between the accused and the alleged similar acts is, however, also a precondition to admissibility. This requirement was set forth in *R. v. Sweitzer*, [1982] 1 S.C.R. 949, at p. 954:

Before evidence may be admitted as evidence of similar facts, there must be a link between the allegedly similar facts and the accused. In other words there must be some evidence upon which the trier of fact can make a proper finding that the similar facts to be relied upon were in fact the acts of the accused for it is clear that if they were not his own but those of another they have no relevance to the matters at issue under the indictment.

Similarly, in *Harris v. Director of Public Prosecutions*, [1952] A.C. 694 (H.L.), it was held, at p. 708, that “evidence of ‘similar facts’ cannot in any case be admissible to support an accusation against the accused unless they are connected in some relevant way with the accused and with his participation in the crime”.

Should the trial judge be required to conclude not only that the evidence suggests that the acts are the work of one person with sufficient force to outweigh the prejudicial effect of the evidence, but that they also are likely the acts of the accused? This is the approach advocated by Professor R. Mahoney in “Similar Fact Evidence and the Stan-

2. Le lien avec l'accusé

Lorsque la preuve de faits similaires produite pour prouver l'identité tend à indiquer que les actes similaires ont été commis par la même personne, alors, logiquement, cette constatation rend la preuve rattachant l'accusé à chaque acte similaire pertinente à l'égard de la question de l'identité pour ce qui concerne l'infraction en cause. De même, dans un acte d'accusation comportant plusieurs chefs d'accusation, le lien entre l'accusé et un chef d'accusation sera pertinent à l'égard de la question de l'identité pour ce qui est des autres chefs d'accusation qui révèlent une similitude frappante du point de vue du mode de perpétration de ces infractions.

Toutefois, l'existence d'un lien entre l'accusé et les actes similaires allégués est également une condition préalable à l'admissibilité. Cette condition a été énoncée dans *R. c. Sweitzer*, [1982] 1 R.C.S. 949, à la p. 954:

Pour que des éléments de preuve soient reçus comme preuve d'actes similaires, il doit y avoir un lien entre les actes que l'on prétend similaires et l'accusé. En d'autres termes, il doit exister des éléments de preuve qui permettent au juge des faits de conclure à bon droit que les actes similaires que l'on veut invoquer sont effectivement les actes de l'accusé, car il est évident que, s'il ne s'agit pas de ses propres actes mais plutôt de ceux d'une autre personne, ceux-ci n'ont aucun rapport avec les questions soulevées par l'acte d'accusation.

De même, dans *Harris c. Director of Public Prosecutions*, [1952] A.C. 694 (H.L.), il a été jugé, à la p. 708, que [TRADUCTION] «la preuve de “faits similaires” ne saurait en aucun cas être admise au soutien d'une infraction reprochée à l'accusé, à moins que ces faits ne soient liés d'une manière pertinente à l'accusé et à sa participation au crime».

Faudrait-il exiger que le juge du procès conclue non seulement que la preuve tend à indiquer — avec suffisamment de force pour l'emporter sur son effet préjudiciable — que les actes sont le fait d'une seule et même personne, mais aussi qu'ils sont vraisemblablement le fait de l'accusé? C'est l'approche que préconise le professeur R. Maho-

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dard of Proof”, [1993] *Crim. L. Rev.* 185, at pp. 196-97, and is implicitly favoured by those courts which have endorsed the “anchor” or “sequential” approach to similar fact evidence. See, e.g., *R. v. Ross*, [1980] 5 W.W.R. 261 (B.C.C.A.); *R. v. J.T.S.*, [1997] A.J. No. 125 (QL) (C.A.).

ney dans «Similar Fact Evidence and the Standard of Proof», [1993] *Crim. L. Rev.* 185, aux pp. 196 et 197, et que favorisent implicitement les tribunaux qui ont souscrit, en matière de preuve de faits similaires, à l’approche «séquentielle» ou approche du «point d’ancrage». Voir, par exemple, *R. c. Ross*, [1980] 5 W.W.R. 261 (C.A.C.-B.); *R. c. J.T.S.*, [1997] A.J. No. 125 (QL) (C.A.).

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The suggestion that the evidence linking the accused to the similar acts must also link the acts to the accused goes too far. Once the trial judge has concluded that the similar acts were likely the work of one person and that there is some evidence linking the accused to the alleged similar acts, it is not necessary to conclude that the similar acts were likely committed by the accused. The answer to this question may well determine guilt or innocence. This is the very question which the trier of fact must determine on the basis of all the evidence related to the similar acts, including of course the accused’s involvement in each act. The standard set out in *Sweitzer* should be maintained. This only requires that the trial judge be satisfied that there is some evidence which links the accused to the similar acts.

La suggestion voulant que la preuve liant l’accusé aux actes similaires doive rattacher les actes à l’accusé va trop loin. Une fois que le juge du procès a conclu que les actes similaires sont probablement le fait d’une seule et même personne, et qu’il existe des éléments de preuve rattachant l’accusé aux actes similaires allégués, il n’est pas nécessaire de conclure que les actes similaires ont probablement été commis par l’accusé. La réponse à cette question peut bien déterminer de la culpabilité ou l’innocence. Il s’agit de la question même que le juge des faits doit trancher en tenant compte de l’ensemble des éléments de preuve se rapportant aux actes similaires, y compris évidemment la participation de l’accusé à chacun des actes. La norme énoncée dans l’arrêt *Sweitzer* devrait être conservée. Elle exige uniquement que le juge du procès soit convaincu qu’il existe des éléments de preuve rattachant l’accusé aux actes similaires.

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Nevertheless, it must be noted that both *Sweitzer*, *supra*, and *Harris*, *supra*, suggest that evidence of mere opportunity will not suffice to establish a sufficient “link to the accused” to render similar fact evidence admissible. This limitation is explained by Viscount Simon’s statement in *Harris*, *supra*, at p. 708 that the similar acts must be connected “in some relevant way with the accused and with his participation in the crime” (emphasis added). Evidence of mere opportunity showing no more than the possibility that the similar act is that of the accused will not suffice to show the accused’s participation in the alleged similar act. Though the low standard set in *Sweitzer* is appropriate and flexible, evidence which discloses no more than a mere possibility that the alleged simi-

Néanmoins, il convient de signaler que les arrêts *Sweitzer* et *Harris*, précités, indiquent que la preuve d’une simple occasion ne suffira pas pour établir «avec l’accusé un lien» suffisant pour rendre une preuve de faits similaires admissible. Cette restriction est expliquée ainsi par le vicomte Simon, dans *Harris*, précité, à la p. 708; celui-ci affirme que les actes similaires doivent être liés [TRADUCTION] «d’une manière pertinente à l’accusé et à sa participation au crime» (je souligne). La preuve d’une simple occasion ne révélant rien d’autre que la possibilité que l’acte similaire soit le fait de l’accusé ne suffira pas pour démontrer la participation de l’accusé à l’acte similaire allégué. Même si la norme peu élevée qui est exposée dans l’arrêt *Sweitzer* est appropriée et souple, la preuve qui ne révèle rien d’autre qu’une simple possibilité que l’acte similaire allégué soit le fait de l’accusé

lar act is the act of the accused will not suffice to render the similar fact evidence admissible.

B. Use of Similar Fact Evidence by the Jury

The provincial courts of appeal have employed two very different approaches to the use of similar fact evidence. The first approach, which has been called a “pooling” or “cumulative” approach, is derived from the decision of the Ontario Court of Appeal in *Simpson*, *supra*, per Martin J.A. See also *Lawson*, *supra*; *R. v. Eng* (1995), 56 B.C.A.C. 18. On this approach, the jury is instructed to examine the similarities between the counts charged in the indictment and to decide, as a preliminary matter, whether the offences were likely committed by one person. Only if they are satisfied on a balance of probabilities that the offences were committed by one person may they consider the evidence of each count in determining whether the accused committed the other offences. If they are unable to make this preliminary finding, they must consider the evidence on each count separately in determining the accused’s innocence or guilt. The jury must also be reminded that they may not convict the accused on any count unless they are satisfied beyond a reasonable doubt that he or she is guilty of that offence.

The trial judge in this case instructed the jury in accordance with *Simpson*. He stated:

If you conclude that Count 1 and Count 2 were likely committed by one person, then the evidence on each count may assist you in deciding whether Brian Arp committed the offences charged in both counts. However, if you do not draw the inference that the two offences were likely committed by one person, then in reaching a decision on any count you must only con-

ne suffira pas pour rendre la preuve de faits similaires admissible.

B. L’utilisation de la preuve de faits similaires par le jury

Les cours d’appel provinciales ont adopté deux approches très différentes quant à l’utilisation de la preuve de faits similaires. La première, qui a été appelée l’approche «cumulative» ou approche de la «mise en commun», découle de l’arrêt de la Cour d’appel de l’Ontario *Simpson*, précité, le juge Martin. Voir aussi *Lawson*, précité; *R. c. Eng* (1995), 56 B.C.A.C. 18. Suivant cette approche, le juge dit au jury d’examiner les similitudes entre les divers chefs reprochés dans l’acte d’accusation et de décider, comme question préliminaire, si les infractions ont vraisemblablement été commises par une seule et même personne. Ce n’est que dans le cas où les jurés sont convaincus, selon la prépondérance des probabilités, que les infractions ont été commises par une seule et même personne qu’ils peuvent tenir compte de la preuve relative à chaque chef d’accusation pour décider si l’accusé a commis les autres infractions. S’ils sont incapables de tirer cette conclusion préliminaire, ils doivent examiner la preuve relative à chaque chef d’accusation séparément pour décider de l’innocence ou de la culpabilité de l’accusé. Il faut également rappeler aux jurés qu’ils ne peuvent déclarer l’accusé coupable à l’égard d’un chef d’accusation que s’ils sont convaincus hors de tout doute raisonnable qu’il est coupable de l’infraction en question.

En l’espèce, le juge du procès a donné ses directives au jury de la manière prévue dans l’arrêt *Simpson*. Il a déclaré ceci:

[TRADUCTION] Si vous arrivez à la conclusion que les infractions reprochées dans le chef d’accusation 1 et le chef d’accusation 2 ont vraisemblablement été commises par la même personne, alors la preuve relative à chaque chef d’accusation peut vous aider à décider si Brian Arp a commis les infractions reprochées dans les deux chefs d’accusation. Toutefois, si vous ne faites pas l’inférence que les deux infractions ont vraisemblablement été commises par la même personne, alors, pour parvenir à une décision à l’égard d’un chef donné, vous devez uniquement tenir compte de la preuve relative à

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sider the evidence relating to that count and put out of your minds the evidence on the other count.

ce chef et faire abstraction de la preuve relative à l'autre chef.

Keep in mind that the accused cannot be convicted of either Count 1 or Count 2 unless you are satisfied beyond a reasonable doubt that he is guilty as charged.

N'oubliez pas que vous ne pouvez déclarer l'accusé coupable du chef d'accusation 1 ou du chef d'accusation 2 que si vous êtes convaincus hors de tout doute raisonnable qu'il est coupable de ce qu'on lui reproche.

⁶⁰ The second approach, which has been called the "anchor" or "sequential" approach, has been adopted primarily by the Alberta Court of Appeal: see *R. v. Studer* (1996), 181 A.R. 399; *R. v. N. (R.S.)* (1995), 31 Alta. L.R. (3d) 424; *Ross, supra*. This approach is normally used in cases where the similar fact evidence arises from an uncharged act, rather than from another count in the same indictment: see *CRIMJI, supra*, 4.60. When applied in the context of a multi-count indictment, the approach requires that the jury must determine first that the accused committed one of the offences charged beyond a reasonable doubt, using only the evidence relevant to that count. Only then may the jury proceed to consider the circumstances of that offence as similar fact evidence with regard to the remaining counts.

La deuxième approche, qui a été appelée l'approche «séquentielle» ou approche du «point d'ancrage», a été adoptée principalement par la Cour d'appel de l'Alberta: voir *R. c. Studer* (1996), 181 A.R. 399; *R. c. N. (R.S.)* (1995), 31 Alta. L.R. (3d) 424; *Ross, précité*. Cette approche est normalement utilisée dans les cas où la preuve de faits similaires découle d'un acte n'ayant pas donné lieu à des accusations, plutôt que d'un autre chef d'accusation dans le même acte d'accusation: voir *CRIMJI, op. cit.*, 4.60. Lorsqu'elle est appliquée dans le contexte d'un acte d'accusation comportant plusieurs chefs, cette approche exige que le jury décide d'abord si l'accusé a commis l'une des infractions reprochées hors de tout doute raisonnable, en se fondant uniquement sur la preuve se rapportant à ce chef d'accusation. Ce n'est qu'après que le jury peut prendre en compte les circonstances de cette infraction comme preuve de faits similaires pour statuer sur les autres chefs d'accusation.

⁶¹ In the case at bar, the trial judge also instructed the jury in accordance with this approach. He stated:

En l'espèce, le juge du procès a lui aussi donné au jury des directives conformes à cette approche. Il a dit ceci:

If you accept the evidence in Count 2 of the Indictment [the Umphrey murder] and conclude that Brian Arp is guilty of that count, and you also decide that the offence in Count 1 [the Blanchard murder] was likely committed by the same person, you may use the evidence, particularly of the use of the sharp-edged implement, to confirm or support the evidence [relating to Count 1].

[TRADUCTION] Si vous acceptez la preuve relative au chef d'accusation 2 de l'acte d'accusation [le meurtre de M^{me} Umphrey] et concluez que Brian Arp est coupable de cette infraction, et si vous décidez également que l'infraction reprochée dans le chef d'accusation 1 [le meurtre de M^{me} Blanchard] a probablement été commise par la même personne, vous pouvez utiliser la preuve, particulièrement celle concernant l'utilisation de l'instrument tranchant, pour confirmer ou appuyer la preuve [relative au chef d'accusation 1].

⁶² The appellant submits that the trial judge erred in his charge to the jury because he failed to direct the jury that before using the evidence related to one murder count to support a finding of guilt on

L'appellant soutient que le juge du procès a commis une erreur dans son exposé au jury, parce qu'il a omis de dire aux jurés que, avant d'utiliser la preuve relative à une des accusations de meurtre

the other murder count, they must first conclude beyond a reasonable doubt that (1) that the accused committed one of the two murder counts, using only the evidence related to that count; or (2) that the same person committed both counts.

To resolve these issues, it is necessary to determine not only the applicable standard of proof where similar fact evidence is used by a jury, but also to set out the correct approach to the use of that evidence. The algebraic possibilities raised by these two questions are impressive. Rather than attempt to evaluate each permutation or combination separately, a review of basic principles will lead to the proper approach.

1. Applicable Principles

The first point to be made is that no standard of proof applies to the “use” of evidence or to evidence itself. Standards of proof apply only to issues of fact. See *Morin, supra*. When similar fact evidence (like any other circumstantial evidence) is adduced to prove identity, the jury is invited to draw inferences and make findings of fact from that evidence. The probative value of similar fact evidence is based on reasoning through probability. The force of the evidence subsists in the proposition that it is unlikely that the accused would be implicated more than once in offences which are unique or markedly similar. It is the unlikelihood of coincidence that gives the evidence its probative force.

The issue in every case is whether the probative value of the evidence outweighs its prejudicial effect. As noted earlier, as a general rule where similar fact evidence is tendered to prove identity if the trial judge is satisfied that it is likely that the same person committed both the similar act and the act in question then the probative value of these similar acts will outweigh its prejudicial

pour appuyer une conclusion de culpabilité à l'égard de l'autre chef de meurtre, ils devaient d'abord conclure hors de tout doute raisonnable (1) que l'accusé avait commis l'un des deux meurtres reprochés, en se fondant uniquement sur la preuve se rapportant à ce chef; ou (2) que la même personne avait commis les infractions reprochées dans les deux chefs d'accusation.

Pour trancher ces questions, il faut non seulement décider quelle est la norme de preuve applicable lorsqu'une preuve de faits similaires est utilisée par un jury, mais aussi exposer la bonne approche en ce qui concerne l'utilisation de cette preuve. Les possibilités algébriques qu'offrent ces deux questions sont impressionnantes. Au lieu de tenter d'évaluer chaque permutation ou combinaison séparément, il convient d'examiner les principes fondamentaux pour découvrir la bonne approche.

1. Les principes applicables

La première observation qui s'impose est qu'aucune norme de preuve ne s'applique à l'«utilisation» de la preuve ou à la preuve elle-même. Les normes de preuve s'appliquent uniquement aux questions de fait. Voir *Morin*, précité. Lorsqu'une preuve de faits similaires (comme toute autre preuve circonstancielle) est produite pour établir l'identité, le jury est invité à en tirer des inférences et des conclusions de fait. La valeur probante de la preuve de faits similaires repose sur un raisonnement axé sur la probabilité. La force de la preuve réside dans la proposition voulant qu'il soit peu probable que l'accusé soit impliqué plus d'une fois dans des infractions présentant un caractère singulier ou une similitude frappante. C'est l'improbabilité d'une coïncidence qui donne à la preuve sa force probante.

Dans chaque cas, la question consiste à déterminer si la valeur probante de la preuve l'emporte sur son effet préjudiciable. Comme il a été souligné plus tôt, en règle générale, lorsqu'une preuve de faits similaires est présentée pour établir l'identité, si le juge du procès est convaincu qu'il est probable que la même personne a commis et l'acte similaire allégué et l'acte en cause, dans un tel cas la

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effect and the evidence will be admitted. If the jury is to rely on similar fact evidence, they too must conclude that the same person committed the alleged similar acts. Any apparent overlap in the functions of judge and jury exists because for similar fact evidence, admissibility frequently depends on weight. See *Hurren* comment, *supra*. As Martin J.A. stated in *Simpson*, *supra*, at pp. 345-46:

It was, of course, for the Judge to decide as a question of law whether the evidence on each count was admissible on the other. His decision in that respect, in the circumstances, depended upon his being satisfied that the similarities in the offences were such as to be capable of supporting a reasonable inference that both offences were likely committed by one man. It was entirely within the province of the jury, however, whether they would draw that inference; whether they drew such inference would depend upon their view of the similarities in the circumstances of the two offences. [Emphasis added.]

Thus, the main issue in this appeal is the proper standard of proof to apply to the primary inference drawn from the similar fact evidence — i.e., should the jury be satisfied on a balance of probabilities or beyond a reasonable doubt that the same person committed the acts in question?

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To state the issue in this manner effectively disposes of the anchor or sequential approach. This must follow because if the probative value of similar fact evidence, as circumstantial evidence, lies in the unlikelihood of coincidence, it simply does not make sense to require one of the allegations to be proved beyond a reasonable doubt as a prerequisite to the trier of fact's consideration of it. Though the similar fact evidence, standing alone, may fall short of proof beyond a reasonable doubt, it can be relied upon to assist in proving another allegation beyond a reasonable doubt. Two separate allegations can support each other to the point of constituting proof beyond a reasonable doubt, even where a reasonable doubt may have existed in

valeur probante de la preuve de ces actes similaires l'emportera sur son effet préjudiciable, et la preuve sera admise. Pour que le jury puisse s'appuyer sur une preuve de faits similaires, il doit lui aussi conclure que la même personne a commis les actes similaires allégués. Le chevauchement qui semble exister entre le rôle du juge et celui du jury découle du fait que l'admissibilité d'une preuve de faits similaires dépend fréquemment de son poids. Voir le commentaire de l'arrêt *Hurren*, précité. Comme l'a affirmé le juge Martin de la Cour d'appel dans *Simpson*, précité, aux pp. 345 et 346:

[TRADUCTION] Il était évidemment loisible au juge de décider, en tant que question de droit, si la preuve relative à chaque chef d'accusation était admissible relativement à l'autre chef. Dans les circonstances, sa décision à cet égard dépendait de la question de savoir s'il était convaincu que les similitudes entre les infractions étaient telles que les deux infractions avaient probablement été commises par un même homme. Il appartenait toutefois entièrement aux jurés de décider s'il convenait de faire cette inférence; la question de savoir s'ils feraient cette inférence serait fonction de leur opinion quant aux similitudes entre les circonstances des deux infractions. [Je souligne.]

Par conséquent, la principale question en litige dans le présent pourvoi est la norme de preuve qu'il convient d'appliquer à l'inférence fondamentale tirée de la preuve de faits similaires: Le jury doit-il être convaincu selon la prépondérance des probabilités ou hors de tout doute raisonnable que la même personne a commis les actes en question?

Formuler la question de cette manière écarte effectivement l'approche séquentielle ou approche du point d'ancrage. C'est inévitable, car si la valeur probante d'une preuve de faits similaires, en tant que preuve circonstancielle, réside dans l'improbabilité d'une coïncidence, il n'est tout simplement pas logique d'exiger qu'une des allégations soit prouvée hors de tout doute raisonnable comme condition préalable à l'examen de cette preuve par le juge des faits. Bien qu'il soit possible que, à elle seule, la preuve de faits similaires n'apporte une preuve hors de tout doute raisonnable, elle peut être invoquée pour aider à prouver une autre allégation hors de tout doute raisonnable. Deux allégations distinctes peuvent s'étayer mutuellement au

relation to each in isolation. See *R. v. White*, [1998] 2 S.C.R. 72, at para. 44, citing *R. v. Bouvier* (1984), 11 C.C.C. (3d) 257 (Ont. C.A.), *per* Martin J.A., *aff'd* [1985] 2 S.C.R. 485.

This reasoning certainly applies when similar fact evidence is admitted to prove identity. In those circumstances the reasoning process flows from the similarity of the acts themselves. As the intervenor the Attorney General for Ontario points out, the probative value of the evidence does not depend on a finding that both offences were necessarily committed by the same person. Rather, it is the likelihood that they had the same perpetrator that sufficiently narrows the scope for coincidence so as to give the evidence legitimate probative value. The unlikelihood of an accused's twice being implicated in two very similar offences may furnish circumstantial evidence of his or her guilt for both. That circumstance, when combined with other evidence in support of each charge, may add up to guilt beyond a reasonable doubt.

The appellant argues that it is contrary to the presumption of innocence and principles of fundamental justice for an accused to be convicted on the basis of evidence pertaining to a separate count or similar act, even though the Crown has not proven beyond a reasonable doubt the critical preliminary fact that one person committed both counts. I cannot accept this submission. As the Attorney General for Ontario stated, it cannot be presumed that because a preliminary determination of fact is not proven to the criminal standard, that the trier of fact is thereby invited to make use of evidence which lacks its purported probative value. It is not inherently unfair that an accused may be convicted even though the jury entertains a doubt as to whether similarity between the acts, on its own, establishes that the same person committed both acts. The appellant's argument presumes that similarity proven to a lesser degree of certainty is without probative value. If the appellant is

point de constituer une preuve hors de tout doute raisonnable, même lorsqu'un doute raisonnable peut avoir existé relativement à chaque allégation prise isolément. Voir *R. c. White*, [1998] 2 R.C.S. 72, au par. 44, citant *R. c. Bouvier* (1984), 11 C.C.C. (3d) 257 (C.A. Ont.), le juge Martin, *conf.* par [1985] 2 R.C.S. 485.

Ce raisonnement s'applique certainement lorsqu'une preuve de faits similaires est admise pour établir l'identité. Dans ces cas, le raisonnement découle de la similitude entre les actes eux-mêmes. Comme le souligne le procureur général de l'Ontario intervenant, la valeur probante de la preuve n'est pas tributaire de la conclusion que les deux infractions ont nécessairement été commises par la même personne. Au contraire, c'est la probabilité qu'elles sont le fait de la même personne qui réduit suffisamment les risques de coïncidence et donne ainsi à la preuve une valeur probante légitime. L'improbabilité qu'un accusé soit impliqué dans deux infractions très similaires peut apporter une preuve circonstancielle de sa culpabilité à l'égard des deux infractions. Cette circonstance, conjuguée à d'autres éléments de preuve présentés au soutien de chaque accusation, peut signifier la culpabilité hors de tout doute raisonnable.

L'appelant soutient qu'il est contraire à la présomption d'innocence et aux principes de justice fondamentale de déclarer un accusé coupable sur le fondement d'une preuve relative à un chef d'accusation distinct ou à un acte similaire, même si le ministère public n'a pas prouvé hors de tout doute raisonnable le fait préliminaire capital qu'une seule et même personne a commis les infractions reprochées dans les deux chefs d'accusation. Je ne puis accepter cet argument. Comme l'a affirmé le procureur général de l'Ontario, on ne peut supposer que, parce qu'une constatation de fait préliminaire n'a pas été établie suivant la norme applicable en matière criminelle, le juge des faits est en conséquence invité à utiliser une preuve dépourvue de la valeur probante qu'elle est censée avoir. Il n'est pas intrinsèquement injuste qu'un accusé puisse être déclaré coupable même si le jury a des doutes sur la question de savoir si, à elle seule, la similitude entre les actes établit que la même personne

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right, then on the same reasoning, it would have to be concluded that *R. v. Carter*, [1982] 1 S.C.R. 938, was wrongly decided.

les a commis tous les deux. L'argument de l'appelant présume qu'une similitude établie suivant un degré moindre de certitude n'a aucune valeur probante. Si l'appelant a raison, alors, suivant le même raisonnement, il faudrait conclure que la mauvaise décision a été rendue dans l'affaire *R. c. Carter*, [1982] 1 R.C.S. 938.

⁶⁹ In *Carter*, it was held that in order for a jury to use the statement of a co-conspirator against an accused as an exception to the hearsay rule, the jury must first conclude, on a balance of probabilities and on the basis of evidence directly admissible against the accused, that the witness and the accused were members of the same conspiracy. Only after this determination is made can the jury make substantive use of the hearsay statements. The Court declined to apply the reasonable doubt standard to that preliminary finding of fact, since to do so would have short-circuited the jury's determination of the ultimate issue in the case, i.e., the guilt of the accused on the charge of conspiracy.

Dans *Carter*, il a été statué que, pour qu'un jury puisse utiliser la déclaration d'un complice contre un accusé en tant qu'exception à la règle du ouï-dire, le jury doit d'abord conclure, selon la prépondérance des probabilités et au moyen de la preuve directement admissible contre l'accusé, que le témoin et l'accusé ont participé au même complot. Ce n'est qu'après avoir tiré cette conclusion que le jury peut utiliser concrètement les déclarations relatées. La Cour a refusé d'appliquer la norme de la preuve hors de tout doute raisonnable à cette conclusion de fait préliminaire, étant donné que l'application de cette norme aurait empêché le jury de trancher la question de fond dans cette affaire, soit la culpabilité de l'accusé relativement à l'accusation de complot.

⁷⁰ More generally, in *R. v. Evans*, [1993] 3 S.C.R. 653, it was held that a preliminary finding of fact governing the use of evidence is normally subject to the civil standard of proof, whether the finding is made by the trial judge at the stage of admissibility or by the jury at the outset of their deliberations. The type of evidence at issue in *Evans* was an admission by the accused. Sopinka J., writing for a majority of the Court, stated as follows, at p. 668:

D'une manière plus générale, dans *R. c. Evans*, [1993] 3 R.C.S. 653, il a été jugé qu'une conclusion de fait préliminaire déterminant l'utilisation d'un élément de preuve est normalement assujettie à la norme de preuve applicable en matière civile, que la conclusion soit tirée par le juge du procès à l'étape de l'admissibilité ou par le jury au début de ses délibérations. Dans *Evans* la preuve en litige était un aveu de l'accusé. Le juge Sopinka, qui a rédigé les motifs des juges majoritaires, a déclaré ceci, à la p. 668:

This Court has affirmed that preliminary questions of fact by the trier of fact may be decided on a balance of probabilities. [Citing *Carter*, *supra*.]

Notre Cour a affirmé que le juge des faits peut trancher les questions de fait préliminaires en se fondant sur la prépondérance des probabilités. [Citant l'arrêt *Carter*, précité.]

If there is some evidence to permit the issue to be submitted to the trier of fact, the matter must be considered in two stages. First, a preliminary determination must be made as to whether, on the basis of evidence admissible against the accused, the Crown has established on a balance of probabilities that the statement is that of the accused. If this threshold is met, the trier of fact should

Si certains éléments de preuve permettent de soumettre la question au juge des faits, celle-ci doit faire l'objet d'un examen en deux temps. Tout d'abord, il faut déterminer si, compte tenu de la preuve admissible contre l'accusé, le ministère public a établi selon la prépondérance des probabilités que la déclaration est celle de l'accusé. Une fois cette exigence préliminaire satisfaite,

then consider the contents of the statement along with other evidence to determine the issue of innocence or guilt.

The general principles enunciated in these cases indicate that the jury should determine, on a balance of the probabilities, whether the similarities between the acts establishes that the two counts were committed by the same person. If that threshold is met, the jury can then consider all the evidence relating to the similar acts in determining whether, beyond a reasonable doubt, the accused is guilty.

However, the general rule that preliminary findings of fact may be determined on a balance of probabilities is departed from in those certainly rare occasions when admission of the evidence may itself have a conclusive effect with respect to guilt. For example, where the Crown adduces a statement of the accused made to a person in authority, the trial judge must be satisfied beyond a reasonable doubt of the voluntariness of the statement. That evidence may of itself, if accepted as true, provide conclusive proof of guilt. Since doubt about the statement's voluntariness also casts doubt on its reliability, proof beyond a reasonable doubt is warranted. See *Ward v. The Queen*, [1979] 2 S.C.R. 30. If this were not the rule, the jury would be permitted to rely on evidence which it could accept as extremely cogent even though the inherent reliability of that evidence was in doubt.

Similar fact evidence, on the other hand, as circumstantial evidence, must be characterized differently, since, by its nature, it does not carry the potential to be conclusive of guilt. It is just one item of evidence to be considered as part of the Crown's overall case. Its probative value lies in its ability to support, through the improbability of coincidence, other inculpatory evidence. As with all circumstantial evidence, the jury will decide what weight to attribute to it. The mere fact that in

le juge des faits doit examiner le contenu de la déclaration en même temps que les autres éléments de preuve pour décider de l'innocence ou de la culpabilité de l'accusé.

Les principes généraux énoncés dans ces arrêts indiquent que le jury devrait décider, selon la prépondérance des probabilités, si les similitudes entre les actes établissent que les infractions reprochées dans les deux chefs d'accusation ont été commises par la même personne. Si cette condition préalable est satisfaite, le jury peut alors examiner l'ensemble de la preuve se rapportant aux actes similaires pour décider si l'accusé est coupable hors de tout doute raisonnable.

Toutefois, il y a dérogation à la règle générale selon laquelle les conclusions de fait préliminaires peuvent être tirées selon la prépondérance des probabilités dans les cas, certes rares, où l'admission de la preuve peut elle-même avoir un effet concluant en ce qui concerne la question de la culpabilité. Par exemple, lorsque le ministère public produit une déclaration de l'accusé à une personne en situation d'autorité, le juge du procès doit être convaincu hors de tout doute raisonnable du caractère volontaire de la déclaration. Cette preuve peut, si elle est tenue pour avérée, apporter en elle-même une preuve concluante de la culpabilité. Étant donné que l'existence d'un doute sur le caractère volontaire de la déclaration se répercute également sur la fiabilité de celle-ci, il est justifié d'exiger une preuve hors de tout doute raisonnable. Voir *Ward c. La Reine*, [1979] 2 R.C.S. 30. Si la règle était différente, le jury serait autorisé à se fonder sur une preuve qu'il pourrait considérer très forte même si la fiabilité intrinsèque de cette preuve était douteuse.

En revanche, en tant que preuve circonstancielle, une preuve de faits similaires doit être qualifiée différemment, étant donné que, de par sa nature, elle ne peut pas être concluante quant à la culpabilité. Elle constitue simplement un des éléments de preuve à examiner parmi tous ceux qui constituent la preuve globale du ministère public. Sa valeur probante réside dans sa capacité d'étayer, par l'improbabilité d'une coïncidence, d'autres éléments de preuve inculpatrices. Comme

a particular case, similar fact evidence might be assigned a high degree of weight by the trier is entirely different from the concept that, by its very nature, the evidence has the potential to be decisive of guilt.

pour tout élément de preuve circonstancielle, le jury décidera du poids qui doit lui être accordé. Le simple fait que, dans un cas particulier, le juge des faits pourrait accorder un poids élevé à une preuve de faits similaires est une toute autre chose que le concept selon lequel, de par sa nature, la preuve peut être décisive quant à la culpabilité.

⁷³ As the intervener the Attorney General for Ontario concedes, it is, of course, conceivable for a single item of circumstantial evidence to be the only evidence of an essential element of the offence in a given case. The criminal standard of proof would have to be applied in those circumstances in order to ensure compliance with the requirement that every essential element in a criminal prosecution must be proven beyond a reasonable doubt. Thus where the Crown's case on the issue of identity is based entirely on the underlying unity between the similar acts, it follows that the standard of proof beyond a reasonable doubt will govern the jury's determination whether one person must have committed both acts.

Comme le concède le procureur général de l'Ontario intervenant, il est évidemment concevable qu'un seul élément de preuve circonstancielle soit la seule preuve d'un élément essentiel de l'infraction dans une affaire donnée. Il faudra alors appliquer la norme de preuve en matière criminelle dans ces circonstances afin de garantir le respect de l'exigence selon laquelle, dans une poursuite criminelle, chaque élément essentiel doit être prouvé hors de tout doute raisonnable. Par conséquent, lorsque la preuve du ministère public sur la question de l'identité repose entièrement sur l'unité sous-jacente entre les actes similaires, il s'ensuit que la norme de la preuve hors de tout doute raisonnable s'applique à la décision du jury sur la question de savoir si une seule et même personne a commis les deux actes.

⁷⁴ The appellant argues that because similar fact evidence carries with it the danger of prejudicial misuse by the trier, a high standard of proof should be imposed as a precondition of its use. However, the danger that a jury will misuse similar fact evidence by engaging in the prohibited line of reasoning is avoided by the strict test for admissibility which ensures that the evidence is sufficiently probative to outweigh the risk of prejudicial misuse, coupled with a cautionary instruction against making improper use of the evidence. These safeguards ensure that the evidence is possessed of legitimate probative value before it reaches the trier of fact and that the jury will appreciate its true relevance. Depriving the jury of resort to proper use of the evidence once it has been admitted would do nothing to guard against its improper use.

L'appelant soutient que, comme il y a risque qu'une preuve de faits similaires fasse l'objet d'un mauvais usage préjudiciable par le juge des faits, une norme de preuve élevée devrait être imposée comme condition préalable à l'utilisation d'une telle preuve. Toutefois, le danger qu'un jury utilise mal une preuve de faits similaires en se livrant au raisonnement interdit est évité, d'une part, par l'application du critère d'admissibilité rigoureux, qui garantit que la preuve a une valeur probante suffisante pour écarter le risque d'un mauvais usage préjudiciable, et, d'autre part, par la mise en garde faite contre l'utilisation inappropriée de cette preuve. Ces mesures garantissent que la preuve a une valeur probante légitime avant d'être soumise au juge des faits et que le jury appréciera sa véritable pertinence. Empêcher le jury d'utiliser la preuve de façon appropriée une fois qu'elle a été admise ne ferait rien pour éviter qu'elle soit utilisée de manière inappropriée.

⁷⁵ On this basis, the correct approach to a consideration of similar fact evidence by a jury is the

Pour ce motif, la bonne approche en ce qui concerne l'examen d'une preuve de faits similaires par

“cumulative” or “pooling” approach. Thus, as a general rule where similar fact evidence is adduced to prove identity, the jury should be instructed that once they have concluded that there is sufficient likelihood that the same person committed the alleged similar acts, they may consider all the evidence relating to the similar acts in considering whether the accused is guilty of the act in question.

2. Use of Evidence Underlying a Prior Acquittal as Similar Fact Evidence in a Subsequent Proceeding Against the Same Accused

Finally, the appellant relies upon cases in which the Crown was prohibited from adducing as similar fact evidence in a subsequent trial of the same accused, testimony given in proceedings in which the accused was acquitted. See, e.g., *R. v. Cullen* (1989), 52 C.C.C. (3d) 459 (Ont. C.A.); *R. v. Verney* (1993), 87 C.C.C. (3d) 363 (Ont. C.A.); *R. v. M. (R.A.)* (1994), 94 C.C.C. (3d) 459 (Man. C.A.); *N. (R.S.)*, *supra*; *R. v. Merdsoy* (1994), 91 C.C.C. (3d) 517 (Nfld. C.A.). The appellant contends that these cases conflict with the basic concept that similar fact evidence is available for use on the basis that two offences were likely committed by the same person. The appellant submits that if a conviction is obtained on one count in a multi-count indictment but the accused is acquitted on the other count, then the conclusion must be that the same person did not commit both offences, and the conviction is tainted to the extent that it was based on the similar fact evidence. As the appellant points out, the problem of inconsistent verdicts would disappear if the jury were directed, at the outset of their deliberations, to decide beyond a reasonable doubt whether both offences were committed by the same person. This approach fuses the two counts together as a necessary consequence of using similar fact evidence, so that the counts must stand or fall together.

un jury est l'approche «cumulative» ou approche de la «mise en commun». Par conséquent, en règle générale, lorsqu'une preuve de faits similaires est produite pour établir l'identité, il faudrait donner aux jurés la directive qu'une fois qu'ils ont conclu à l'existence d'une probabilité suffisante que la même personne a commis les actes similaires allégués, ils peuvent tenir compte de tous les éléments de preuve se rapportant aux actes similaires pour décider si l'accusé est coupable de l'acte en question.

2. L'utilisation d'une preuve sous-tendant un acquittement antérieur en tant que preuve de faits similaires dans des poursuites subséquentes contre le même accusé

En dernier lieu, l'appelant invoque des arrêts dans lesquels il a été interdit au ministère public de produire, en tant que preuve de faits similaires, dans un procès subséquent intenté contre le même accusé, des témoignages faits dans des poursuites s'étant soldées par l'acquittement de l'accusé. Voir, par exemple, *R. c. Cullen* (1989), 52 C.C.C. (3d) 459 (C.A. Ont.); *R. c. Verney* (1993), 87 C.C.C. (3d) 363 (C.A. Ont.); *R. c. M. (R.A.)* (1994), 94 C.C.C. (3d) 459 (C.A. Man.); *N. (R.S.)*, précité; *R. c. Merdsoy* (1994), 91 C.C.C. (3d) 517 (C.A.T.-N.). L'appelant soutient que ces arrêts sont incompatibles avec l'idée fondamentale qu'une preuve de faits similaires peut être utilisée parce que deux infractions ont probablement été commises par la même personne. L'appelant prétend que, si un accusé est déclaré coupable d'un des deux chefs d'un acte d'accusation mais qu'il est acquitté de l'autre chef, il faut alors conclure que les deux infractions n'ont pas été commises par la même personne, et la déclaration de culpabilité est viciée dans la mesure où elle reposait sur une preuve de faits similaires. Comme le souligne l'appelant, le problème des verdicts incompatibles disparaîtrait si l'on invitait le jury, au début de ses délibérations, à décider hors de tout doute raisonnable si les deux infractions ont été commises par la même personne. Cette approche a pour effet de fondre ensemble les deux chefs d'accusation en tant que conséquence nécessaire de l'utilisation d'une preuve de faits similaires, de sorte que le sort des deux chefs d'accusation doit être le même.

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Those cases which have restricted the use of evidence underlying an acquittal as similar fact evidence in a subsequent trial of the same accused have done so on the basis of this Court's decision in *Grdic v. The Queen*, [1985] 1 S.C.R. 810. Lamer J. wrote for the majority of the Court, at p. 825:

There are not different kinds of acquittals and, on that point, I share the view that "as a matter of fundamental policy in the administration of the criminal law it must be accepted by the Crown in a subsequent criminal proceeding that an acquittal is the equivalent to a finding of innocence". . . . To reach behind the acquittal, to qualify it, is in effect to introduce the verdict of "not proven", which . . . has never been . . . part of our law.

. . .

However, this does not mean that, for the purpose of the application of the doctrine of *res judicata*, the Crown is estopped from re-litigating all or any of the issues raised in the first trial. But it does mean that any issue, the resolution of which had to be in favour of the accused as a prerequisite to the acquittal, is irrevocably deemed to have been found conclusively in favour of the accused. . . .

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The principle enunciated in *Grdic* is fundamental to our system of justice. It seeks to ensure that an accused need not repeatedly defend himself against the same allegations. Nevertheless, in certain circumstances, the fact of an accused's prior acquittal may have relevance to an ultimate issue in a subsequent trial. For example, in *R. v. Ollis*, [1900] 2 Q.B. 758, the accused was charged with obtaining money by false pretences. He had obtained funds in exchange for a cheque that was later dishonoured. The accused was acquitted at his first trial on the basis that when he gave the cheque to the complainant, he expected to receive funds to cover it. The accused was later again indicted with obtaining money by false pretences, and at his second trial the Crown adduced the evidence of the first complainant as relevant to the accused's guilty state of mind. The court held that the evidence was properly admissible. As Widgery J.

Dans les décisions où on a limité l'utilisation d'une preuve sous-tendant un acquittement comme preuve de faits similaires dans un procès subséquent contre le même accusé, le tribunal s'est fondé sur l'arrêt de notre Cour *Grdic c. La Reine*, [1985] 1 R.C.S. 810. Le juge Lamer a écrit ceci, au nom de la majorité, à la p. 825:

Il n'existe pas différentes sortes d'acquittements et, à cet égard, je souscris au point de vue selon lequel [TRA-DUCTION] «le ministère public doit accepter en tant que principe fondamental de l'administration du droit criminel que, dans une poursuite criminelle subséquente, un acquittement équivaut à une déclaration d'innocence» [. . .] Aller au-delà de l'acquittement pour le qualifier revient en fait à introduire le verdict de «non prouvé» qui [. . .] n' [. . .] a jamais fait partie [. . .] de notre droit.

. . .

Toutefois, cela ne signifie pas qu'aux fins de l'application de la doctrine de la *res judicata*, la poursuite ne peut rouvrir certaines ou toutes les questions soulevées au premier procès. Mais cela signifie effectivement que toute question qui a nécessairement dû être résolue en faveur de l'accusé pour qu'il y ait acquittement est réputée de façon irrévocable avoir été tranchée définitivement en faveur de l'accusé. . . .

Le principe énoncé dans l'arrêt *Grdic* est fondamental pour notre système de justice. Il vise à faire en sorte qu'un accusé ne soit pas obligé de se défendre à répétition contre les mêmes allégations. Néanmoins, dans certaines circonstances, le fait qu'un accusé ait, dans le passé, été acquitté d'accusations pesant contre lui peut être pertinent à l'égard d'une question fondamentale dans un procès subséquent. Par exemple, dans *R. c. Ollis*, [1900] 2 Q.B. 758, l'inculpé était accusé d'avoir obtenu de l'argent par des faux-semblants. Il avait obtenu des fonds en échange d'un chèque qu'on avait par la suite refusé d'accepter. Au terme du premier procès, l'accusé avait été acquitté pour le motif que, lorsqu'il avait remis le chèque au plaignant, il s'attendait à recevoir des fonds couvrant le chèque. Par la suite, l'accusé a de nouveau été inculpé d'avoir obtenu de l'argent par des faux-semblants et, au second procès, le ministère public a produit le témoignage du premier plaignant en tant que preuve pertinente à l'égard de l'état d'esprit coupable de l'accusé. La cour a statué que la

stated in *G. (an infant) v. Coltart*, [1967] 1 All E.R. 271 (Q.B.), at p. 276:

... it may well happen that evidence relating to the charge giving rise to the acquittal will be called on the subsequent charge, but, if it is so called, it will be called because it has relevance to the subsequent charge quite independently of any question whether the accused was guilty or innocent on the first charge. [Emphasis added.]

On the basis of this reasoning, the evidence of the prior acquittal in *Ollis* was correctly admitted. It was admitted to prove intent. Even if the accused was acquitted of the first charge, the fact that he had been tried on similar charges once before went to his knowledge of wrongdoing irrespective of his guilt on the first charge. The fact of his prior trial and acquittal could be admitted for this limited purpose, but would of course require a careful instruction from the trial judge. Yet, in most situations, it will be unfair and inappropriate to admit the evidence underlying the prior acquittal as similar fact evidence in a subsequent trial of the same accused.

Even so, I cannot accept the proposition that the principle set out in *Grdic*, *supra*, applies to verdicts rendered by the same trier of fact in respect of charges tried together in a single proceeding. There is nothing unfair or logically irreconcilable about a jury having reasonable doubt whether the accused committed an act while also finding that it is likely that he committed it. There may very well be good reasons to exclude similar fact evidence underlying a prior acquittal in a subsequent proceeding. However, the principle has no application where the alleged similar acts are the subject of a multi-count indictment. There a careful instruction from the trial judge will be required. It will be necessary to explain to the jury that evidence adduced on one count upon which the jury would acquit

preuve était admissible. Comme l'a affirmé le juge Widgery dans *G. (an infant) c. Coltart*, [1967] 1 All E.R. 271 (Q.B.), à la p. 276:

[TRADUCTION] ... il peut bien arriver que la preuve relative à l'accusation qui s'est soldée par un acquittement soit produite relativement à l'accusation subséquente, mais, si tel est le cas, cette preuve sera produite parce qu'elle est pertinente à l'égard de l'accusation subséquente, indépendamment de la question de savoir si l'accusé était innocent ou coupable de la première accusation. [Je souligne.]

Suivant ce raisonnement, la preuve de l'acquittement antérieur a été à bon droit admise dans *Ollis*. Elle a été admise pour prouver l'intention. Même si l'accusé avait été acquitté de la première accusation, le fait qu'il avait déjà subi un procès relativement à des accusations similaires se rapportait à sa connaissance d'un acte fautif, indépendamment de sa culpabilité relativement à la première accusation. Son procès et son acquittement antérieurs pouvaient être admis pour cette fin limitée, mais ils exigeaient évidemment des directives minutieuses de la part du juge du procès. Néanmoins, dans la plupart des situations, il sera injuste et inopportun d'admettre une preuve sous-tendant l'acquittement antérieur en tant que preuve de faits similaires dans un procès subséquent contre le même accusé.

Malgré cela, je ne puis accepter la thèse voulant que le principe énoncé dans l'arrêt *Grdic*, précité, s'applique aux verdicts rendus par le même juge des faits relativement à des accusations jugées ensemble dans un même procès. Il n'y a rien d'injuste ou de logiquement irréconciliable dans le fait qu'un jury ait un doute raisonnable sur la question de savoir si l'accusé a commis un acte, mais arrive également à la conclusion que l'accusé a probablement commis cet acte. Il peut très bien exister de bonnes raisons d'exclure une preuve de faits similaires sous-tendant un acquittement antérieur dans une poursuite subséquente. Toutefois, ce principe ne s'applique pas lorsque les actes similaires allégués font l'objet d'un acte d'accusation comportant plusieurs chefs. Dans ces cas, le juge du procès devra donner des directives minutieuses au jury. Il est nécessaire d'expliquer au jury que la preuve produite relativement à un chef d'accusation à l'égard duquel celui-ci prononce un acquitte-

may be used in assessing the liability on another count or counts.

ment peut être utilisée pour décider de la culpabilité à l'égard d'un ou plusieurs autres chefs.

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In summary, where similar fact evidence is admitted to prove identity in a multi-count indictment situation, a proper charge to the jury should include the following factors considered by Martin J.A. in *Simpson*, *supra*, and by this Court in *Sweitzer*, *supra*, and *D. (L.E.)*, *supra*:

En résumé, lorsqu'une preuve de faits similaires est admise pour établir l'identité dans le cadre d'un acte d'accusation comportant plusieurs chefs, un bon exposé au jury devrait inclure les facteurs suivants, qui ont été examinés par le juge Martin de la Cour d'appel dans l'arrêt *Simpson*, précité, et par notre Cour dans les arrêts *Sweitzer* et *D. (L.E.)*, précités:

(1) The trial judge should instruct the jury that they may find from the evidence, though they are not required to do so, that the manner of the commission of the offences is so similar that it is likely they were committed by the same person.

(1) Le juge du procès devrait dire aux jurés qu'ils peuvent conclure, à la lumière de la preuve — quoique rien ne les oblige à le faire — que le mode de perpétration des infractions présente des similitudes telles qu'il est probable qu'elles ont été commises par la même personne.

(2) The judge should then review the similarities between the offences.

(2) Le juge du procès devrait ensuite passer en revue les similitudes entre les infractions.

(3) The jury should then be instructed that if they conclude it is likely the same person committed more than one of the offences, then the evidence on each of those counts may assist them in deciding whether the accused committed the other similar count or counts.

(3) Puis, le juge du procès devrait dire aux jurés que, s'ils concluent qu'il est probable que la même personne a commis plus d'une des infractions, alors la preuve relative à chacun de ces chefs d'accusation peut les aider à décider si l'accusé a commis les autres chefs d'accusation similaires.

(4) The trial judge must instruct the jury that if it accepts the evidence of the similar acts, it is relevant for the limited purpose for which it was admitted.

(4) Le juge du procès doit dire aux jurés que, s'ils acceptent la preuve des actes similaires, cette preuve est pertinente, mais uniquement à l'égard de la fin limitée pour laquelle elle a été admise.

(5) The jury must be warned that they are not to use the evidence on one count to infer that the accused is a person whose character or disposition is such that he or she is likely to have committed the offence or offences charged in the other count or counts.

(5) Les jurés doivent être avertis qu'ils ne peuvent pas utiliser la preuve relative à un chef d'accusation pour inférer que l'accusé est une personne possédant une nature ou une disposition telle qu'elle a probablement commis les infractions reprochées dans les autres chefs d'accusation.

(6) If they do not conclude that it is likely the same person committed the similar offences, they must reach their verdict by considering the evidence related to each count separately, and put out of their minds the evidence on any other count or counts.

(6) Si les jurés ne concluent pas qu'il est probable que la même personne a commis les infractions similaires, ils doivent rendre leur verdict en examinant la preuve relative à chaque chef d'accusation séparément, et faire abstraction de la preuve relative aux autres chefs d'accusation.

(7) Finally, the trial judge must of course make it clear that the accused must not be convicted on any count unless the jury are satisfied beyond a reasonable doubt that he or she is guilty of that offence.

3. Application to this Appeal

The trial judge's charge to the jury, based on *Simpson, supra*, that if they concluded both counts were likely committed by the same person, they could use the evidence on each count to assist in deciding the appellant's guilt on both counts does not offend s. 7 or s. 11(d) of the *Charter*. The additional charge instructing the jury to decide whether the appellant was guilty of the Umphrey murder and to decide whether both counts were committed by one person before using the evidence on both counts in respect of either count could not have prejudiced the accused. This ground of appeal must therefore fail.

C. *Admissibility of Hair Samples*

The appellant contends that the taking of his hair samples and their subsequent use in the Umphrey murder investigation infringed his rights under s. 7 and s. 8 of the *Charter*, and that the impugned evidence should have been excluded under s. 24(2) of the *Charter*. The appellant argues that the relevant time for determining whether there was a seizure in this case was July 26, 1990, when the appellant consented to give scalp and pubic hair samples in connection with the investigation of the Blanchard murder. The appellant contends that this consent did not extend to the storage and subsequent use of the hair samples in the Umphrey investigation, and thus the seizure of the samples for a purpose beyond the scope of the original consent is unlawful.

(7) Enfin, le juge du procès doit évidemment indiquer clairement aux jurés qu'ils ne doivent déclarer l'accusé coupable d'un chef d'accusation que s'ils sont convaincus hors de tout doute raisonnable que l'accusé est coupable de l'infraction en question.

3. L'application au présent pourvoi

La directive qu'a donnée le juge du procès aux jurés en se fondant sur l'arrêt *Simpson*, précité, — c'est-à-dire que s'ils concluaient que les infractions reprochées dans les deux chefs d'accusation avaient probablement été commises par la même personne, ils pouvaient utiliser la preuve relative à chaque chef pour statuer sur la culpabilité de l'accusé à l'égard des deux chefs d'accusation —, ne porte atteinte ni à l'art. 7 ni à l'al. 11d) de la *Charte*. La directive supplémentaire indiquant aux jurés de décider si l'accusé était coupable du meurtre de M^{me} Umphrey et si les infractions reprochées dans les deux chefs d'accusation avaient été commis par une seule et même personne avant d'utiliser la preuve relative aux deux chefs à l'égard de l'un et l'autre chef ne peut pas avoir causé préjudice à l'accusé. Ce moyen d'appel doit donc être rejeté.

C. *L'admissibilité des échantillons de cheveux et de poils*

L'appellant soutient que le prélèvement d'échantillons de cheveux et de poils et leur utilisation subséquente dans le cadre de l'enquête sur le meurtre de M^{me} Umphrey ont porté atteinte aux droits que lui garantissent les art. 7 et 8 de la *Charte*, et que la preuve contestée aurait dû être écartée en application du par. 24(2) de la *Charte*. L'appellant affirme que la date pertinente pour décider s'il y a eu saisie en l'espèce est le 26 juillet 1990, date à laquelle il a consenti à fournir des échantillons de cheveux et de poils pubiens dans l'enquête sur le meurtre de M^{me} Blanchard. Il prétend que ce consentement ne s'appliquait pas à l'entreposage des échantillons et à leur utilisation subséquente dans l'enquête sur le meurtre de M^{me} Umphrey, et donc que la saisie des échantillons à une fin qui dépasse l'étendue du consentement initial est illégale.

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83 The appellant further argues that even if this Court finds the relevant time for determining whether there was a seizure is March 16, 1993 when the police seized the samples from the RCMP laboratory pursuant to a search warrant, an invalid consent on July 26, 1990 would undermine the lawfulness of the warrant. The police would not have grounds to “re-possess” the hair samples for use in the Umphrey investigation if their use was limited to the Blanchard investigation. Thus any seizure under the search warrant would also violate s. 8 of the *Charter*.

84 Both the appellant’s submissions are based upon his position that the taking of the samples for purposes beyond the scope of the consent he gave in 1990 constitutes an unlawful seizure. As Iacobucci J. stated for the majority in *Borden*, *supra*, at p. 160, a seizure occurs whenever there is a non-consensual taking by state officials of an item in which the citizen has a reasonable expectation of privacy. See also *R. v. Dymnt*, [1988] 2 S.C.R. 417. Where the police seek to obtain blood or hair samples from a suspect, the expectation of privacy with respect to bodily integrity is clear. Thus, where the police do not possess statutory authority to demand such a sample, it can only be taken with the consent of the suspect.

85 Iacobucci J. writing for the majority in the *Borden* case carefully considered the meaning of consent. In that case, two sexual assaults occurred within a few months of each other. The accused was arrested for the second assault. The accused complied with a police request to provide hair and blood samples in connection with the second assault. However, the police hoped to use the blood sample to establish through DNA testing that the accused was the assailant in the first assault. The accused was given virtually no indication that the samples were also being sought in

L’appelant plaide en outre que, même si notre Cour conclut que la date pertinente pour décider s’il y a eu saisie est le 16 mars 1993, date à laquelle des policiers ont saisi en vertu d’un mandat de perquisition les échantillons conservés par le laboratoire de la GRC, l’invalidité du consentement donné le 26 juillet 1990 saperait la légalité du mandat. Les policiers n’auraient alors pas été justifiés de «reprenre possession» des échantillons de cheveux et de poils pour les utiliser dans l’enquête sur la mort de M^{me} Umphrey si l’utilisation de ces échantillons était restreinte à l’enquête sur la mort de M^{me} Blanchard. Par conséquent, la saisie effectuée en vertu du mandat de perquisition violerait également l’art. 8 de la *Charte*.

Les deux arguments de l’appelant reposent sur sa thèse que le prélèvement des échantillons à des fins qui dépassent l’étendue du consentement donné en 1990 constitue une saisie illégale. Comme l’a déclaré le juge Iacobucci pour la majorité dans *Borden*, précité, à la p. 160, il y a saisie chaque fois que l’État prend, sans le consentement d’un citoyen, un bien appartenant à ce dernier et à l’égard duquel il a une attente raisonnable en matière de respect de la vie privée. Voir aussi *R. c. Dymnt*, [1988] 2 R.C.S. 417. Lorsque des policiers cherchent à obtenir des échantillons de sang ou des échantillons de cheveux et de poils d’un suspect, l’existence d’attentes en matière de respect de la vie privée en ce qui concerne l’intégrité physique est claire. Par conséquent, lorsque les policiers ne sont pas autorisés par la loi à exiger de tels échantillons, ceux-ci ne peuvent être prélevés qu’avec le consentement du suspect.

Dans les motifs qu’il a rédigés au nom de la majorité dans l’arrêt *Borden*, le juge Iacobucci a examiné attentivement le sens du mot consentement. Dans cette affaire, deux agressions sexuelles avaient été commises en l’espace de quelques mois. L’accusé avait été appréhendé relativement à la seconde agression. À la demande des policiers, il avait consenti à fournir des échantillons de cheveux et de poils ainsi qu’un échantillon de sang relativement à cette agression. Cependant, les policiers souhaitaient utiliser l’échantillon de sang pour prouver, au moyen d’une analyse génétique,

connection with the first assault. The majority held that there is a “link between the scope of a valid consent and the scope of the accused’s knowledge in relation to the consequences of that consent” (at p. 163). Iacobucci J. observed that for the waiver to be valid the person purporting to consent must have sufficient information to give a valid consent. It was put in this way at pp. 162-63:

In order for a waiver of the right to be secure against an unreasonable seizure to be effective, the person purporting to consent must be possessed of the requisite informational foundation for a true relinquishment of the right. A right to choose requires not only the volition to prefer one option over another, but also sufficient available information to make the preference meaningful. . . .

... [There is] a link between the scope of a valid consent and the scope of the accused’s knowledge in relation to the consequences of that consent.

He went on to conclude, at pp. 164-65, that:

It was incumbent on the police, at a minimum, to make it clear to the respondent that they were treating his consent as a blanket consent to the use of the sample in relation to other offences in which he might be a suspect. I express no opinion on the question of whether there would have been a seizure if the intention of the police to use the sample in respect of the [earlier] assault case, and the subsequent appropriation of the sample for that purpose, did not exist until some time after the seizure of the blood for use in the [later] case. . . .

The degree of awareness of the consequences of the waiver of the s. 8 right required of an accused in a given case will depend on its particular facts. Obviously, it will not be necessary for the accused to have a detailed comprehension of every possible outcome of his or her consent. However, his or her understanding should include the fact that the police are also planning to use the product of the seizure in a different investigation from the one for which he or she is detained.

que l’accusé était l’auteur de la première agression. L’accusé n’avait reçu à toutes fins utiles aucune indication que ces échantillons étaient également demandés relativement à la première agression. Les juges de la majorité ont statué qu’il existe un «lien entre l’étendue d’un consentement valide et l’étendue de la connaissance qu’a l’accusé des conséquences de ce consentement» (à la p. 163). Le juge Iacobucci a fait remarquer que, pour que la renonciation soit valide, la personne qui est censée donner son consentement doit posséder suffisamment de renseignements pour donner un consentement valide. Il s’est exprimé en ces termes, aux pp. 162 et 163:

Pour que la renonciation au droit à la protection contre les saisies abusives soit réelle, la personne qui est censée donner son consentement doit disposer de tous les renseignements requis pour pouvoir renoncer réellement à ce droit. Le droit de choisir exige non seulement que la personne puisse exercer sa volonté de préférer une solution à une autre, mais aussi qu’elle possède suffisamment de renseignements pour faire un choix utile. . .

... [Il existe un] lien entre l’étendue d’un consentement valide et l’étendue de la connaissance qu’a l’accusé des conséquences de ce consentement.

Il a ensuite tiré les conclusions suivantes, aux pp. 164 et 165:

Il leur incombait [aux policiers] à tout le moins de dire clairement à l’intimé qu’ils considéraient son consentement comme un consentement général à l’utilisation de l’échantillon relativement à d’autres infractions dont il pourrait être soupçonné. Je ne me prononce pas sur la question de savoir s’il y aurait eu saisie si les policiers n’avaient eu l’intention d’utiliser l’échantillon pour [la première] agression d’octobre, et l’avaient ensuite pris à cette fin, qu’après avoir saisi le sang pour l’utiliser dans [la seconde] affaire. . .

Le degré de conscience qu’un accusé doit avoir des conséquences d’une renonciation au droit qui lui est garanti par l’art. 8 dépend des faits particuliers de chaque cas. Évidemment, il ne sera pas nécessaire que l’accusé ait une compréhension approfondie de chacune des répercussions possibles de son consentement. Toutefois, il devrait comprendre notamment que les policiers comptent utiliser le produit de la saisie dans une enquête portant sur une infraction différente de celle pour laquelle il est détenu.

Thus the general principle to be taken from *Borden* is that the scope of a valid consent may be limited by the extent of the accused's knowledge and the information given to the accused as to the consequences of giving his consent. The majority specifically left open the issue raised by the appellant in this case.

Par conséquent, le principe général qui se dégage de l'arrêt *Borden* est que l'étendue d'un consentement valide peut être limitée par l'étendue de la connaissance qu'a l'accusé et par l'information qui lui est donnée quant aux conséquences du consentement. Les juges majoritaires ont explicitement laissé en suspens la question soulevée par l'appellant dans cette affaire.

⁸⁶ It is noteworthy that both Lamer C.J. (Gonthier J. concurring) and McLachlin J. expressed an opinion on this issue in *obiter*. As Lamer C.J. stated, at pp. 153-54:

While I do not think it necessary or desirable to deal with the broader question of what is required for a valid consent, I agree with Iacobucci J. that the individual must be told about the anticipated purpose known to the police when the consent is requested.

Il convient de souligner que le juge en chef Lamer (avec l'appui du juge Gonthier) et le juge McLachlin ont exprimé une opinion sur cette question dans des remarques incidentes. Comme l'a dit le juge en chef Lamer, aux pp. 153 et 154:

Bien que je ne croie pas qu'il soit nécessaire ou souhaitable d'examiner la question plus générale des conditions requises pour un consentement valide, je suis d'accord avec le juge Iacobucci pour dire que l'individu doit être informé de l'objectif visé et déjà connu des policiers lorsqu'ils lui demandent son consentement.

However, in agreeing, I would not wish to be taken as accepting the general proposition that the consent, once validly given in the criminal law context, constrains the uses that may be made of the sample or the results of analysis thereof. Such an approach runs the risk of considering investigations and consents to searches and seizures in watertight compartments. [Emphasis added.]

Toutefois, je ne voudrais pas que l'on considère que cela signifie que je souscris au principe général voulant qu'une fois qu'il est donné valablement dans le contexte du droit criminel, le consentement restreint les usages qui peuvent être faits de l'échantillon ou des résultats de son analyse. Une telle approche risque d'entraîner une analyse compartimentée des enquêtes et des consentements donnés à des fouilles, perquisitions et saisies. [Je souligne.]

McLachlin J., in short concurring reasons, agreed with the Chief Justice that the individual must be informed of the "anticipated purpose known to the police when the consent is requested" (at p. 171), but confined that observation to the facts of the *Borden* case. She noted, at p. 171, that there is an important public interest in allowing the police to correlate evidence obtained on one offence with other outstanding offences. In this regard, the comments of the Law Reform Commission in its Working Paper No. 34 on *Investigative Tests* (1984), at pp. 68-69, are apposite:

Dans de brefs motifs concordants, le juge McLachlin a convenu avec le Juge en chef que l'individu doit être informé de l'«objectif visé et déjà connu des policiers lorsqu'ils lui demandent son consentement» (à la p. 171), mais a confiné cette observation aux faits de l'affaire *Borden*. À la p. 171, elle a souligné que sert un intérêt public important le fait de permettre aux policiers de mettre la preuve obtenue relativement à une infraction en corrélation avec d'autres infractions non résolues. À cet égard, les commentaires faits par la Commission de réforme du droit, à la p. 76 de son Document de travail 34 intitulé *Les méthodes d'investigation scientifiques* (1984), sont pertinentes:

... we are inclined to believe that the destruction of some records ... is more likely to hamper the legitimate function of the police in the detection of crime and the protection of society as a whole than to constitute a useful and valuable safeguard for the privacy of innocent

Nous pensons qu'il est vraisemblable, au contraire, que la destruction de certains dossiers dans de telles circonstances pourrait nuire à la police dans l'exercice de son rôle légitime qui est de détecter la criminalité et de protéger l'ensemble de la société au lieu de constituer une

individuals. Fingerprint records . . . might be crucial in the investigation of serious offences committed by persons who for one reason or another have escaped conviction for other offences of which they were in fact guilty. Where they have been reasonably and lawfully obtained, can it be said that their retention “unreasonably or arbitrarily (interferes) with individual rights and freedoms . . .”?

Nevertheless decisions of this court make it clear that if consent to the provision of bodily samples is to be valid it must be an informed consent. That is to say persons consenting must be aware of their rights and as far as possible the consequences of their consent. See *Borden, supra*, at pp. 161-62; and *R. v. Mellenthin*, [1992] 3 S.C.R. 615, at p. 624. Yet if neither the police nor the consenting person limit the use which may be made of the evidence then, as a general rule no limitation or restriction should be placed on the use of that evidence. As Iacobucci J. explained in *Borden, supra*, at p. 164, “it will not be necessary for the accused to have a detailed comprehension of every possible outcome of his or her consent” in order for the consent to be valid.

I agree that the obligation imposed on the police in obtaining a valid consent extends only to the disclosure of those anticipated purposes known to the police at the time the consent was given. To impose any greater obligation could, as the Chief Justice explained, at p. 154, “permit the construction of what would amount to elaborate evidentiary privileges based upon either the purposes for which the evidence was originally obtained or upon the information supplied at the time consent was given”. This view accords with the majority’s finding, at p. 164, that “it will not be necessary for the accused to have a detailed comprehension of

garantie utile et valable du droit des gens honnêtes à leur vie privée. Les copies authentiques d’empreintes digitales, par exemple, peuvent avoir une importance capitale quand l’investigation porte sur des crimes graves qui sont commis par des personnes qui, quelle que soit la raison, n’ont pas été reconnues coupables d’infractions dont elles étaient en fait coupables. Peut-on affirmer que la conservation des copies authentiques d’empreintes digitales obtenues légalement et d’une manière raisonnable «(empiète) de façon abusive ou arbitraire sur les droits et libertés des personnes . . .»?

Néanmoins, les arrêts de notre Cour indiquent clairement que, pour que le consentement au prélèvement d’échantillons de substances corporelles soit valide, il doit reposer sur un consentement éclairé. En d’autres mots, les personnes qui donnent ce consentement doivent être au courant de leurs droits et, autant que possible, des conséquences de leur consentement. Voir *Borden*, précité, aux pp. 161 et 162; et *R. v. Mellenthin*, [1992] 3 R.C.S. 615, à la p. 624. Toutefois, si ni les policiers ni la personne qui donne son consentement ne limitent l’utilisation qui peut être faite de l’élément de preuve, alors, en règle générale, l’utilisation de cet élément de preuve ne devrait être assortie d’aucune limite ou restriction. Comme l’a expliqué le juge Iacobucci dans *Borden*, précité, à la p. 164, «il ne sera pas nécessaire que l’accusé ait une compréhension approfondie de chacune des répercussions possibles de son consentement» pour que le consentement soit valide.

J’admets que l’obligation faite aux policiers d’obtenir un consentement valide ne concerne que la divulgation des objectifs visés et déjà connus des policiers lorsque le consentement est donné. Imposer une obligation plus grande pourrait, comme l’a expliqué le Juge en chef, à la p. 154, «permettre d’interpréter l’équivalent de privilèges complexes relatifs à la preuve en fonction des fins pour lesquelles la preuve a tout d’abord été obtenue ou des renseignements qui ont été fournis au moment où le consentement a été donné». Ce point de vue est compatible avec la conclusion des juges majoritaires, à la p. 164, qu’«il ne sera pas nécessaire que l’accusé ait une compréhension approfondie de chacune des répercussions possibles de

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every possible outcome of his or her consent” in order for the consent to be valid.

son consentement» pour que le consentement soit valide.

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In the absence of any limitation placed by the police or the consenting party on the use to be made of the hair sample, there is nothing inherently unfair or illegal about the police retaining evidence obtained in connection with one investigation and using it in connection with a later investigation which was not anticipated by the police at the time the consent was given. The police in this case could not possibly have foreseen that 30 months after they had lawfully obtained the appellant's hair samples, the appellant would again be the suspect in another homicide. Moreover, at the time the samples were taken, the appellant was clearly informed that if the police gathered “any evidence as a result of that hair sample, [it would be used] in court” (emphasis added). Thus it is apparent that the appellant's consent was not limited in any way, nor was it vitiated through a lack of knowledge as to the consequences of that consent. The seizure of his hair samples in 1990 was both lawful and reasonable.

En l'absence de toute restriction dont les policiers ou la partie donnant son consentement auraient assorti l'utilisation devant être faite des échantillons de cheveux ou de poils, il n'y a rien d'intrinsèquement injuste ou illégal dans le fait de permettre à des policiers de conserver des éléments de preuve recueillis dans le cadre d'une enquête donnée et de les utiliser dans une enquête subséquente qui n'était pas prévue au moment où le consentement a été donné. En l'espèce, les policiers ne pouvaient pas vraiment prévoir que, 30 mois après avoir obtenu légalement les échantillons de poils et de cheveux de l'appelant, ce dernier serait de nouveau un suspect dans une autre affaire d'homicide. De plus, au moment du prélèvement des échantillons, l'appelant a été clairement informé que, si les policiers recueillaient [TRADUCTION] «quelque élément de preuve grâce à cet échantillon de cheveux et de poils, [cet élément serait utilisé] devant les tribunaux» (je souligne). Par conséquent, il est évident que le consentement de l'appelant n'était assorti d'aucune limite et qu'il n'était pas vicié par sa méconnaissance des conséquences de ce consentement. La saisie des échantillons de cheveux et de poils en 1990 était légale et raisonnable.

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In my view, once the appellant's hair samples were taken by the police with the unconditional and reasonably informed consent of the appellant, he ceased to have any expectation of privacy in them. As the learned trial judge stated in his ruling on admissibility of the evidence obtained from the hair samples:

À mon avis, une fois les échantillons de cheveux et de poils prélevés par les policiers avec le consentement inconditionnel et raisonnablement éclairé de l'accusé, celui-ci a cessé d'avoir à leur égard des attentes en matière de respect de sa vie privée. Comme l'a déclaré le juge du procès dans sa décision sur l'admissibilité de la preuve tirée des échantillons de cheveux et de poils:

It is, in my view, both illogical and undesirable to suggest that when a body sample, be it hair or blood, is voluntarily surrendered to the police with full recognition that it is to be used in the course of investigation that there continues to be any expectation of privacy extending to the “informational content” of that sample. In my view, no such expectation real or implied existed. . . .

[TRADUCTION] À mon avis, il est illogique et inacceptable de prétendre que la personne qui donne volontairement aux policiers un échantillon d'une substance corporelle — qu'il s'agisse de cheveux, de poils ou de sang, en sachant parfaitement que cet échantillon sera utilisé dans le cadre d'une enquête — continue d'avoir des attentes en matière de respect de sa vie privée en ce qui a trait au «contenu informationnel» de cet échantillon. Selon moi, il n'existait aucune attente de la sorte, réelle ou implicite . . .

The trial judge considered the issue of the validity of the consent to the use of hair samples. He considered the consent to be valid and on the evidence before him he could properly reach that conclusion. In those circumstances his decision should be accepted.

However, for the purpose of this appeal, it is unnecessary to consider whether the appellant may have had a subsisting privacy interest in the samples or in the information that could be obtained from them after he gave his unconditional consent to the authorities to take the samples. The police seized the samples from the RCMP laboratory in 1993 pursuant to a search warrant. The appellant has argued that an invalid consent on July 26, 1990 would undermine the lawfulness of the warrant, yet the consent given in 1990 was valid in all respects, and the validity of the warrant has not been assailed in any other way. Thus, even if the appellant had a subsisting privacy interest in the hair samples, they were seized pursuant to a properly issued warrant. The validity of that warrant has not been directly challenged.

IV. Disposition

In the result, the appeal is dismissed.

Appeal dismissed.

Solicitor for the appellant: G. D. McKinnon, Q.C., Vancouver.

Solicitor for the respondent: The Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Attorney General of Canada: The Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General for Ontario: The Attorney General for Ontario, Toronto.

Le juge du procès a examiné la question de la validité du consentement à l'utilisation des échantillons de cheveux et de poils. Il a estimé que le consentement était valide et, compte tenu de la preuve dont il disposait, il était fondé à tirer cette conclusion. Dans ces circonstances, sa décision devrait être acceptée.

Toutefois, pour les fins du présent pourvoi, il est inutile de se demander si, après avoir consenti inconditionnellement au prélèvement des échantillons par les policiers, l'appelant a pu conserver un droit au respect de sa vie privée à l'égard de ces échantillons ou des renseignements susceptibles d'en être tirés. Les policiers ont saisi les échantillons au laboratoire de la GRC en 1993 en vertu d'un mandat de perquisition. L'appelant a plaidé que l'invalidité du consentement donné le 26 juillet 1990 saperait la légalité du mandat, mais le consentement donné en 1990 était valide à tous égards, et la validité du mandat n'a été attaquée d'aucune autre façon. Par conséquent, même si l'appelant avait encore quelque droit au respect de sa vie privée en ce qui concerne les échantillons de cheveux et de poils, ces échantillons ont été saisis en vertu d'un mandat décerné régulièrement. La validité de ce mandat n'a pas été contestée directement.

IV. Le dispositif

En définitive, le pourvoi est rejeté.

Pourvoi rejeté.

Procureur de l'appelant: G. D. McKinnon, c.r., Vancouver.

Procureur de l'intimée: Le procureur général de la Colombie-Britannique, Victoria.

Procureur de l'intervenant le procureur général du Canada: Le procureur général du Canada, Ottawa.

Procureur de l'intervenant le procureur général de l'Ontario: Le procureur général de l'Ontario, Toronto.

*Solicitor for the intervener the Attorney General
for Alberta: The Attorney General for Alberta,
Edmonton.*

*Procureur de l'intervenant le procureur général
de l'Alberta: Le procureur général de l'Alberta,
Edmonton.*

Apotex Inc. v. Pharmascience Inc., 2004 FC 1198 (CanLII)

Date: 2004-08-31
Docket: T-1456-01
Parallel 36 CPR (4th) 218; 260 FTR 254
citations:
URL: <http://canlii.ca/t/1hvq5>
Citation: Apotex Inc. v. Pharmascience Inc., 2004 FC 1198 (CanLII),
<<http://canlii.ca/t/1hvq5>> retrieved on 2014-02-25
Noteup: Search for decisions citing this decision
Reflex Related decisions, legislation cited and decisions cited
Record

Date: 20040831

Docket: T-1456-01

Citation: 2004 FC 1198

Toronto, Ontario, August 31st, 2004

Present: The Honourable Mr. Justice Blais

BETWEEN:

APOTEX INC. and

BERNARD CHARLES SHERMAN

Plaintiffs

(Defendants by

Counterclaim)

and

PHARMASCIENCE INC.

Defendant

(Plaintiff by

Counterclaim)

REASONS FOR ORDER AND ORDER

[1] Apotex Inc. and Bernard Charles Sherman (plaintiffs) have commenced an action against Pharmascience Inc. (defendant) for infringement of Canadian Patent No. 2,100,836 ('836 Patent). During the examination for discovery of the defendant's representative, Ms. Jeanette Echenberg, defendant's counsel objected to a great number of questions. The plaintiffs moved for an order to compel the defendant's witness to answer these questions. Prothonotary Aronovitch issued an order on May 3, 2004. She ordered the defendant to answer some of the questions for which an answer had been requested by the plaintiff, but otherwise denied the motion, such that a great number of questions were not ordered to be answered. The plaintiffs are now moving to have this Court set aside the Order of May 3, 2004 ruling on the March 22, 2004 motion of the plaintiffs.

FACTS

[2] The issue in the case before the Court is the extent of discovery in a patent case. We will only briefly summarize the main action, since its details are not relevant to the instant proceedings. However, context is necessary to understand the Prothonotary's decision.

[3] Patent '826 was first issued on February 3, 1998; it was re-issued, with additional claims, on March 13, 2001. The invention is entitled "Pharmaceutical composition" and the abstract reads as follows:

A pharmaceutical composition which comprises ticlopidine hydrochloride together with stearic acid and other suitable pharmaceutical excipients, and which does not contain any organic acid other than stearic acid.

[4] The plaintiffs claim that Patent '826 vests the plaintiffs with the exclusive right and privilege of making, using and selling ticlopidine hydrochloride compositions which contain stearic acid and are substantially free of an effective amount of another organic acid.

[5] The plaintiffs claim that the defendant has made or acquired, and has sold, pharmaceutical tablets containing ticlopidine hydrochloride, stearic acid, povidone, starch, magnesium stearate, microcrystalline cellulose, butylated hydroxyanisole and opadry, in other words, tablets which are a ticlopidine hydrochloride composition which contains stearic acid and are substantially free of an effective amount of another organic acid. For this reason, the defendant has infringed most of the claims of the '836 Patent.

[6] The defendant claims that Patent '836 is invalid, and further submits that the claims of the Patent do not cover all ticlopidine hydrochloride formulations containing stearic

acid. The defendant thus disputes the plaintiffs' exclusive right to make or sell ticlopidine hydrochloride compositions which contain stearic acid and are substantially free of an effective amount of another organic acid.

[7] The defendant specifically denies infringement. If infringement of any claim is found, Patent '836, according to the defendant, covers old science and the claims are broader than the invention made or disclosed. Finally, the defendant argues that it purchased, constructed or acquired the invention covered by claims 7 to 27 (added in the reissuance of the Patent) before the reissuance occurred in 2001, and accordingly has the right to sell to others any composition covered by claims 7 to 27 without liability.

[8] In its counterclaim, the defendant submits that the '836 Patent and the claims under the Patent are and have always been invalid and void, for lack of novelty, obviousness, lack of utility and deficiency of specification. In addition, the defender argues that the claims are overbroad, in that they do not state explicitly what is new in the invention.

SUBMISSIONS OF THE PARTIES

Plaintiffs

[9] The questions that remain unanswered are designed to obtain information on how the defendant's product functions in a manner which does not infringe the claims of the '836 Patent. As well, the plaintiffs seek to understand the defendant's various pleas concerning the invalidity of the '836 Patent. The plaintiffs argue that the questions relate to the factual basis for the defendant's pleadings, and that the test of Rule 240 of the *Federal Court Rules* has been misapplied.

[10] The plaintiffs submit that at discovery, a party must answer any question that is relevant to any unadmitted allegation of fact, as per Rule 240. The standard of relevance to be applied is generous and flexible, according to the plaintiffs, who cite case law to this effect. The defendant should answer all questions related to its allegations of non-infringement and invalidity. These answers are clearly within the knowledge of the defendant, and the information sought is factual.

[11] While it would be inappropriate, based on the jurisprudence, to ask questions relating to a person's understanding or interpretation of a patent, questions relating to a party's product and its characteristics are relevant and appropriate.

[12] When the defendant pleads "common general knowledge" as the basis for its contention that the invention was obvious, it has the onus to provide facts to support that allegation. Thus, when the plaintiffs sought to get more information on what was meant by "common general knowledge" specifically in regard to the alleged infringement, it was not satisfactory to have the Prothonotary find that the questions need not be answered because pertaining to general knowledge.

[13] The burden is on the person who alleges obviousness to prove it. If some document or prior use forms are part of the common general knowledge, these should be specified. On the other allegations as well, the plaintiffs argue that there is a need to discover the evidence underlying the pleadings.

Defendant

[14] The defendant argues that the grounds for a declaration of invalidity relate to technical issues, properly the domain of expert witnesses, or to questions of law, properly the domain of the Court. The plaintiffs allege infringement, but based on the list of ingredients provided by Pharmascience. The plaintiffs allege they do not understand the pleadings of non-infringement and invalidity. The plaintiffs allege infringement based on the content of the tablets, not the way they function. Any question related to functionality is therefore not related to material facts in the pleadings, but rather to expert opinion. In regards to invalidity, the defendant claims that the plaintiffs fail to acknowledge that "common general knowledge" of a person skilled in the art is necessarily expert opinion and outside the scope of discovery.

[15] The defendant has already provided the plaintiffs with extensive factual information on the formulation and process to make the defendant's tablets and on the stability testing and preformulation work carried out by Teva, the manufacturer of the tablets sold by the defendant. In addition, the Prothonotary has already ordered further answers regarding material facts relating to the pleadings.

[16] The Order should stand, since the basis for refusing the plaintiffs' questions was sound. The questions at issue are either irrelevant to the facts pleaded, call for expert opinion (construction of patent or of prior art as opposed to allegation of fact) or seek unnecessary explanations where the pleadings are sufficiently detailed.

ANALYSIS

Standard of review

[17] The *Federal Court Rules, 1998* provide the possibility of an appeal of a prothonotary's decision to a Federal Court judge, without prescribing what standard of review should apply. The authority of the prothonotary to order a party to answer questions on discovery is given by section 97, which states that where a person fails to answer a proper question, the Court may order that person to answer the question. The standard applicable to discretionary decisions of the prothonotary was established in *Canada v. Aqua-Gem Investments Ltd.*, [1993 CanLII 2939 \(FCA\)](#), [1993] 2 F.C. 425 (C.A.), and restated with approval by the Supreme Court of Canada in *Z.I. Pompey Industrie v. ECU-Line N.V.*, [2003 SCC 27 \(CanLII\)](#), [2003] 1 S.C.R. 450 at paragraph 18:

Discretionary orders of prothonotaries ought to be disturbed by a motions judge only where (a) they are clearly wrong, in the sense that the exercise of discretion was based upon a wrong principle or a misapprehension of the facts, or (b) in making them, the prothonotary improperly exercised his or her discretion on a question vital to the final issue of the case.

[18] In *1029894 Ontario Inc. v. Dolomite Svenska Aktiebolag*, [1999] F.C.J. No. 1719, Justice Sharlow stated that an order granting or denying a demand for particulars was not a question vital to the final issue of the case. Thus, in the instant case, this Court will set

aside the order of the Prothonotary only if it can be found that the order was clearly wrong, that is, based upon a wrong principle or a misapprehension of the facts.

Was the order clearly wrong?

[19] The relevant principles that apply in examinations for discovery can be summarized as follows:

1) Expert opinion is not a proper subject for discovery. (*Canada v. Irish Shipping Ltd.*, [1976] 1 F.C. 418 (F.C.A.)). This principle is restated in many decisions of this Court, notably *Foseco Trading A.G. v. Canadian Ferro Hot Metal Specialties, Ltd.*, [1991] F.C.J. No. 421 (F.C.T.D.); *Risi Stone Ltd. v. Groupe Permacon Inc.*, [1994] F.C.J. No. 777 (F.C.T.D.); *James River Corp. of Virginia v. Hallmark Cards, Inc.*, [1997] F.C.J. No. 152 (F.C.T.D.).

2) Witnesses are not to testify on questions of law. Asking a witness to provide facts in support of the pleadings of the party is not proper at discovery. In *Can-Air Services Ltd. v. British Aviation Insurance Co.*, [1988] A.J. No. 1022 (Alta. C.A.), Justice Côté, writing for the Court of Appeal of Alberta, stated as follows:

Another fundamental rule is that an examination for discovery may seek only facts, not law: *Turta v. C.P.R.* (1951) 2 W.W.R. (ns) 628, 631-2 (Alta.); cf. *Curlett v. Can. Fire Ins. Co.* [reflex](#), [1938] 3 W.W.R. 357 (Alta.). These questions try to evade that rule by forcing the witness to think of the law applicable or relied upon, then use it to perform some operation (selecting facts), and then announce the result. The result looks on the surface like a mere collection of facts, but it really is not: *Seven Seas v. Kraemer* (3 June) [1982] Alta. Unrep. Dec. 1831, at 1835 (M.). The witness cannot know what facts will help him in court until he knows the law. So what facts he relies on must be based upon his view of the law.

Therefore, an examination for discovery may seek facts only, not argument.

(...) In my view, the question "upon what facts do you rely for paragraph X of your pleading?" is always improper.

The idea is restated explicitly in *Kun Shoulder Rest Inc. v. Joseph Kun Violin and Bow Maker Inc.*, [1997] F.C.J. No. 1386 (F.C.T.D.):

¶ 15 A number of the questions asked by counsel for the Plaintiff seek to have the discovery witness advise as to the facts relied upon in support of certain allegations in the pleadings.

¶ 16 It is proper to ask a discovery witness to speak of all the facts, surrounding a certain incident, of which the witness either knows or must properly inform himself or herself about. It is never permissible to ask a discovery witness as to the facts relied upon in support of a certain allegation, for this requires the witness to choose facts and disclose how his lawyer

might prove a given allegation. While a witness may know the general approach that his or her lawyer intends to take, a witness cannot know what facts will assist until he or she knows the law. The particular facts that will be relied upon is based upon counsel's view of the law. An examination for discovery of a witness seeks to discover fact, not argument as to what is relevant in order to prove a given plea.

¶ 17 Beneath this concept of the proper way to explore for relevant facts is the fundamental rule that examination for discovery is as to facts, not as to law. To allow a question, requiring the witness to select facts upon which he or she relies in order to support a given allegation, is to try to evade this fundamental rule by requiring the witness to consider the applicable law, then use it to select facts and to announce a result.

3) It can sometimes be a little difficult to distinguish between fact and law. Since Rule 240 provides that factual questions must be answered, provided they are relevant, and since relevance is wider in discovery than at trial (*McLeod Lake Indian Band v. Chingee*, [1998] F.C.J. No. 683), Justice Reed in *Foseco*, *supra*, found that where the factual component was more important, the question had to be answered :

The Federal Court of Appeal has made it plain that when the evidence sought is the subject-matter of expert opinion, evidence to be disclosed pursuant to Rule 482, questions relating thereto are not required to be answered on discovery. It has also made it plain that where the question is one clearly on its face seeking an opinion from the witness, that the question is not required to be answered. I have not been able to find, however, an articulation of the appropriate principle, in a case such as the present, where the information sought is technical in nature (and for that reason might be addressed in an affidavit of an expert witness), but is within the common knowledge of the plaintiff and where the question is of a factual nature although it can arguably be said to require expression of opinion by the witness, in the sense that many assertions of "fact" require the expression of an "opinion". It is my conclusion that in such cases the principle to be applied is that the factual nature of the question takes precedence and the question should be answered.

4) Finally, the jurisprudence has stated that questions related to the interpretation of common general knowledge and the construction of patent or of prior art need not be answered in discovery, to the extent that these answers are based on the opinion of experts. From *James River Corp. of Virginia v. Hallmark Cards, Inc.*, [1997] F.C.J. No. 152 (F.C.T.D.):

¶ 37 Counsel for the defendant indicates that when he responded to the plaintiff's demand for particulars, he tracked the wording of the patent so that the pleading basically says that whatever the patent means this was part of the prior art, a matter of common general knowledge. The defendant has given the plaintiff all the prior art documents of which it is aware and takes the position that further evidence respecting the state of the prior art or common general knowledge is a matter for expert opinion evidence at trial. The decisions in *Jackmorr Manufacturing Ltd. v. Waterloo Metal Stampings Ltd.* [reflex](#), (1985), 8 C.P.R. (3d) 271 (F.C. A.S.P.) and *Cabot Corporation v. 318602 Ontario Ltd.* [reflex](#), (1986), 12 C.P.R. (3d) 462 (F.C. A.S.P.) are cited. In these decisions it was held that insofar as answers to

questions concerning common general knowledge are based on the opinion of experts, they did not have to be answered on discovery. Insofar as such was not so based, they were required to be answered. I cannot conclude that the Associate Senior Prothonotary's decision, declining to require that the questions be answered, was clearly wrong, as based on either a wrong principle of law or a misapprehension as to the facts.

[20] An examination of the jurisprudence shows that there are fine distinctions to be made between what will be considered an essentially technical question which must nevertheless be answered on discovery, and what is properly the domain of the expert and ultimately, the judge at trial.

[21] Considering the careful distinctions that have been drawn by the Prothonotary in her decision; considering that the defendant has been ordered to answer questions of a technical but predominantly factual nature; and considering that a review of the questions for which the Prothonotary did not compel an answer indicates that they are indeed matters of expert opinion, or common general knowledge, or questions of law, or are irrelevant, I cannot come to the conclusion that the Prothonotary in her decision has applied the wrong principle of law or misapprehended the facts. Therefore her decision should stand.

[22] For these reasons, the motion is dismissed.

ORDER

THIS COURT ORDERS that:

- The motion be dismissed;
- Costs to the defendant be established at \$2,500.

Blais"

"Pierre

J.F.C.

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-1456-01

STYLE OF CAUSE: APOTEX INC. and

BERNARD CHARLES SHERMAN

Plaintiffs

(Defendants by

Counterclaim)

and

PHARMASCIENCE INC.

Defendant

(Plaintiff by

Counterclaim)

PLACE OF HEARING: TORONTO, ONTARIO**DATE OF HEARING:** JULY 26, 2004

REASONS FOR ORDER

AND ORDER BY: BLAIS J.**DATED:** AUGUST 31, 2004**APPEARANCES BY :**

Mr. David Lederman

FOR THE PLAINTIFFS

Ms. P. Bremner

FOR THE DEFENDANT

SOLICITORS OF RECORD:

GOODMANS LLP

FOR THE PLAINTIFFS

Barristers & Solicitors

Toronto, Ontario

HITCHMAN & SPRINGINGS

FOR THE DEFENDANT

Barristers & Solicitors

Toronto, Ontario

FEDERAL COURT

Date: 20040831

Docket: T-1456-01

BETWEEN:

APOTEX INC. and

BERNARD CHARLES SHERMAN

Plaintiffs

(Defendants by Counterclaim)

and

PHARMASCIENCE INC.

Defendant

(Plaintiff by Counterclaim)

REASONS FOR ORDER AND ORDER

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** Traduction **

Intitulé de la cause :
Sperry Corp. c. John Deere Ltd.

Entre
Sperry Corporation, demanderesse, et
John Deere Limited et Deere & Company, défenderesses

[1984] A.C.F. no 1145

[1984] F.C.J. No. 1145

82 C.P.R. (2d) 1

No du greffe T-95-79

Cour fédérale du Canada - Division de première instance
 Ottawa (Ontario)

Le juge McNair

Entendu : les 16 et 23 janvier 1984.

Rendu : le 30 août 1984.

(71 paragr.)

Propriété intellectuelle -- Brevets -- Procédure -- Enquêtes préalables -- Interrogatoire préalable -- John Deere Limited présente une requête en vue d'obtenir une ordonnance forçant les co-inventeurs à l'emploi chez Sperry Corp. à comparaître de nouveau, pour être interrogé au préalable -- Les inventeurs résident actuellement aux États-Unis -- Ils ne peuvent être contraints à comparaître au Canada pour être interrogés au préalable -- Requête accueillie en partie.

John Deere Limited (Deere) présente une requête en vue d'obtenir une ordonnance forçant un employé ou un dirigeant de Sperry Corp. (Sperry) à comparaître de nouveau, pour être interrogé au préalable, afin de répondre à certaines questions posées au cours de précédents interrogatoires -- Le but de l'interrogatoire est de confronter les inventeurs à leurs affidavits déposés dans les procédures de redélivrance du brevet en litige -- La requête vise également l'émission d'une ordonnance enjoignant à Sperry de faire comparaître les deux inventeurs ou, subsidiairement, l'interrogatoire préalable de ces personnes en leurs qualités de dirigeant et d'employé de Sperry -- L'action est une poursuite en contrefaçon du brevet d'invention d'une moissonneuse -- DISPOSITIF : Requête accueillie en partie -- Les inventeurs résident actuellement aux États-Unis -- Ils ne peuvent être contraints à comparaître au Canada pour être interrogés au préalable -- Un interrogatoire

préalable orienté sur le point soulevé ne serait pas une simple cueillette de renseignements à l'aveuglette. Les fins de la justice seraient mieux desservies en l'espèce si une ordonnance était émise enjoignant à Sperry de faire comparaître l'inventeur-dirigeant -- Cependant, le co-inventeur, qui n'est qu'un employé de Sperry, ne devrait pas être enjoint à subir un autre interrogatoire -- Concernant l'autre volet de la requête, si Sperry a en sa possession des copies des transcriptions, des pièces et des dépositions dans les procédures antérieures, ces copies devraient être produites pour fins de vérification et d'examen par Deere -- Aussi, on ne peut forcer une partie à répondre en interrogatoire à des questions préalables de nature à donner une interprétation du mémoire descriptif -- Il n'y a pas lieu de répondre à la question concernant le mémoire descriptif ou son interprétation -- Enfin, certaines questions sont vagues et non pertinentes -- Il n'y a pas lieu d'y répondre.

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Législation citée :

Loi sur la preuve du Canada, S.R. 1970, chap. E-10, art. 23(1)

Loi sur les brevets, S.R.C. 1970, chap. T-4, art. 47, art. 55(1)

Règles de la Cour fédérale, art. 465(1)(b), art. 465(5), art. 465(9), art. 465(12), art. 465(19), art. 483(5)

United States Code, Titre 28 art. 1782

Avocats :

Gordon Henderson, c.r. et June Steinberg, pour la demanderesse.

Douglas S. Johnson, c.r. et James Carsen, pour les défenderesses.

MOTIFS DE L'ORDONNANCE

1 LE JUGE McNAIR :-- La Cour a été originairement saisie de deux demandes.

2 La première était la demande unilatérale écrite, de la demanderesse, en vue d'obtenir une ordonnance fixant la date et le lieu de l'instruction, conformément à la règle 483(5). Selon la demanderesse, cette demande aurait provoqué une activité soudaine chez les défenderesses. Par la suite, ces dernières ont présenté une requête en vue d'obtenir une ordonnance forçant le dirigeant ou le représentant désigné de la demanderesse à comparaître de nouveau, pour être interrogé au préalable, afin de répondre à certaines questions posées au cours des précédents interrogatoires préalables et pour produire certains documents. La requête visait également l'émission d'une ordonnance enjoignant à la demanderesse de faire comparaître, pour fins d'interrogatoire préalable, ses employés Horace G. McCarthy et Emmett F. Glass, les inventeurs et cédants du brevet d'invention ou, subsidiairement, l'interrogatoire préalable de ces personnes en leurs qualités respectives de dirigeant et d'employé de la demanderesse. La demanderesse a concédé que sa demande unilatérale d'instruction soit ajournée sine die en attendant qu'il soit statué sur la requête des défenderesses.

3 Il y a lieu de rappeler brièvement les faits. L'action est une poursuite en contrefaçon du brevet d'invention d'une moissonneuse, pour laquelle la demanderesse présente une réclamation en vertu des lettres patentes no 924 111 et du brevet canadien redélivré no 1 043 577. L'action a été intentée le 8 janvier 1979.

4 Les mêmes parties étaient en cause dans une action relative à un brevet intentée aux États-Unis en 1969

et terminée en 1975. Cette action portait sur une invention semblable à celle qui fait l'objet de la présente action instituée au Canada. Deere & Company ont eu gain de cause dans l'action intentée aux États-Unis, le brevet ayant été déclaré invalide. Au cours de cette instance, Deere avait pris les dépositions des inventeurs du brevet, Horace G. McCarthy et Emmett F. Glass, entendu leur témoignage lors de l'instruction et contre-interrogé chacun d'eux. Les défenderesses tentent à présent d'interroger au préalable ces personnes à titre de cédants du brevet d'invention, conformément à la règle 465(5). Subsidiairement, elles demandent une ordonnance en vertu de la règle 465(19) les autorisant à interroger au préalable McCarthy, à titre de dirigeant de la société demanderesse, et Glass, à titre d'employé.

5 La demanderesse soutient que les défenderesses ont bénéficié du témoignage des inventeurs au cours du procès américain et que ces démarches ne sont qu'une manoeuvre dilatoire de plus de leur part. Au soutien de cette allégation, les procureurs de la demanderesse soulignent qu'ils avaient écrit aux procureurs des défenderesses le 22 juin 1981 pour les aviser qu'ils ne feraient pas comparaître les inventeurs pour interrogatoire préalable, pour le motif que les dispositions des Règles de la Cour fédérale ne conféraient pas aux défenderesses le droit à une telle communication. Une requête subséquente en vue d'obtenir cet interrogatoire fut également refusée.

6 Les défenderesses ont enfin présenté une demande ex parte devant la Cour de District des États-Unis, Eastern District of Pennsylvania, conformément à l'article 1782, Titre 28 du United States Code, en vue d'obtenir une ordonnance permettant de prendre, au cours d'un interrogatoire oral, les dispositions de la demanderesse, Sperry Corporation, et des inventeurs, Horace G. McCarthy et Emmett F. Glass, afin de s'en servir dans l'instance canadienne, et de produire des documents. La Cour de District des États-Unis émit une ordonnance en ce sens le 29 septembre 1983. La demanderesse, Sperry Corporation, présenta une requête le 11 octobre 1983 pour faire annuler cette ordonnance. Le 16 novembre 1983, la Cour de District des États-Unis rendit une ordonnance annulant la précédente. La permission de prendre les dépositions orales de McCarthy et de Glass aux États-Unis fut donc refusée. Les défenderesses demandèrent à la Cour de réexaminer l'affaire.

7 La première question consiste à savoir si les défenderesses peuvent interroger les cédants et inventeurs en vertu des règles de cette Cour relatives aux interrogatoires préalables.

8 Il semble utile de reproduire les paragraphes pertinents des règles relatives à la communication à cet égard.

9 La règle 465(5) prévoit l'interrogatoire préalable du cédant d'un brevet d'invention. Elle se lit comme suit:

- (5) Le cédant d'un brevet d'invention, d'un droit d'auteur, d'une marque de commerce, d'un dessin industriel ou de tout bien, droit ou intérêt peut être interrogé au préalable par une partie qui est opposée à tout cessionnaire. (Lorsque le contexte le permet, la mention faite dans la présente Règle d'un individu qui doit être interrogé ou d'un individu qui est interrogé comprend un tel concessionnaire).

10 La règle 465(12), qui y est directement liée, stipule ce qui suit:

- (12) Lorsqu'un individu qui doit être interrogé au préalable est hors du ressort de la Cour, temporairement ou d'une façon permanente, la Cour pourra ordonner, ou les parties pourront convenir, que l'interrogatoire préalable soit tenu a un endroit, et de telle manière, qui sera considérée comme juste et convenable.

11 La règle 465(19) prévoit un autre interrogatoire et elle se lit comme suit:

- (19) La Cour pourra, pour des raisons spéciales, mais exceptionnellement, et dans sa discrétion, ordonner un autre examen préalable après qu'une partie ou cessionnaire aura été examiné au préalable en vertu de la présente Règle.

12 La règle 465(1)b) prévoit un interrogatoire préalable lorsque la partie à interroger est une corporation ou un corps ou un groupe de personnes. Elle stipule ce qui suit:

- b) si la partie est une corporation ou un corps ou autre groupe de personnes autorisé à ester en justice, soit en son propre nom soit au nom d'un membre de sa direction ou d'une autre personne, en interrogeant un membre de la direction ou autre membre de cette corporation ou de ce groupe [...]

13 Le pouvoir d'interroger au préalable doit s'appuyer en tout cas sur les règles elles-mêmes.

14 Lorsque l'une des parties est une corporation ou un corps ou un groupe de personnes, la procédure normale prévoit la désignation, sur accord des parties, d'un dirigeant de la corporation ou d'un membre du groupe pour qu'il se soumette à l'interrogatoire. Si les parties ne parviennent pas à s'entendre, la Cour peut procéder à cette désignation. La comparution d'un dirigeant pour interrogatoire en vertu de la règle 465(1)b) peut être imposée par la signification d'une convocation émise par l'examinateur. Le défaut de comparaître entraîne comme sanction qu'un demandeur peut voir son action rejetée et un défendeur sa défense radiée. La comparution du cédant d'un brevet d'invention pour interrogatoire en vertu de la règle 465(5) ne peut être imposée que par subpoena selon la règle 465(9). La règle 465(5) ne s'applique qu'au cédant d'un brevet d'invention et non à une partie. Elle comporte une connotation personnelle et ne prévoit ni n'autorise l'émission d'une ordonnance d'interrogatoire préalable à l'encontre d'une partie à l'action.

15 À mon avis, la règle 465(1)b) n'autorise nullement à interroger au préalable d'employé d'une corporation ou d'un groupe de personnes en l'absence d'un accord entre les parties à cet effet et avec le consentement de la personne à interroger. Le mot "membre" qui y figure ne peut comprendre qu'un membre de la direction ou un autre membre de cette corporation ou de ce groupe de personnes; il ne peut s'étendre aux employés. Je tire cette conclusion parce que la requête des défenderesses et d'autres documents à l'appui font plusieurs fois allusion aux inventeurs et cédants McCarthy et Glass, à titre d'employés de la demanderesse.

16 Les cédants et inventeurs résident actuellement dans l'État de Pennsylvanie, aux États-Unis d'Amérique. Peuvent-ils être contraints à comparaître au Canada pour être interrogés au préalable?

17 Il est à présent bien établi que le champ d'application de la règle 465(5) relative à l'interrogatoire préalable du cédant d'un brevet d'invention est très limité, en ce que cette règle ne peut servir une partie lorsque la personne à examiner sous son régime réside à l'extérieur du Canada et se trouve hors de la portée d'un subpoena émis par cette Cour. Voir *Lido Industrial Products Ltd. c. Teledyne Industries Inc.*, [1979] 1 C.F. 310, 41 C.P.R. (2e) 1; *Sternson Limited c. CC Chemicals Limited*, [1982] 1 C.F. 350, 58 C.P.R. (2e) 145; et *Corning Glass Works c. Canada Wire & Cable Company Limited et al*, non publié - [no du greffe T-1944-81].

18 Analysant l'application de la règle 465 dans l'affaire *Sternson*, le juge Ryan a établi très clairement le principe à la page 355:

... cette Règle n'accorde pas le droit à une partie dans une poursuite en contrefaçon dont les intérêts sont opposés à ceux du breveté également partie à l'action, d'interroger au préalable le cédant du brevet, celui-ci n'étant pas partie à l'action et

refusant d'être interrogé, lorsqu'en raison de son absence du Canada le cédant ne peut faire l'objet d'un subpoena en vertu de l'alinéa (9); et j'ajouterais qu'il ne semble pas exister de convention internationale de nature à servir de fondement à une ordonnance aux termes de l'alinéa 465(12). 300

19 À mon avis, les Règles n'autorisent nullement à contraindre les inventeurs et cédants Horace G. McCarthy et Emmett F. Glass à comparaître pour être interrogés au préalable à Toronto ou ailleurs au Canada, conformément à la règle 465(5).

20 La seule question qui reste à trancher sous cet aspect de l'application des Règles est de savoir si les défenderesses peuvent obtenir la communication d'Horace G. McCarthy, à titre de dirigeant de la demanderesse, et d'Emmett F. Glass, à titre d'employé, conformément à la règle 465(19). Une certaine jurisprudence s'est développée sur ce point.

21 La règle 465(19) n'a pas pour but d'ouvrir la porte à des interrogatoires préalables en série, qui se feraient à l'aveuglette. Elle n'est pas restreinte au nouvel interrogatoire d'une partie ou d'une personne déjà interrogée au préalable. Mais la partie qui demande un autre interrogatoire préalable doit prouver que c'est "pour des raisons spéciales, mais exceptionnellement" afin de justifier l'émission d'une ordonnance. Pour constituer une "raison spéciale", l'information recherchée doit être de façon évidente pertinente au litige. Pour conclure à une exception, la Cour doit être convaincue que les renseignements ne peuvent être obtenus au moyen de la procédure habituelle par laquelle la personne interrogée s'informe sur des sujets dont il n'a pas personnellement connaissances. Voir *Lipper c. La Reine*, [1980] 1 C.F. 827; et *Imperial Marine Industries Ltd. c. Fireman's Fund Insurance Co.*, [1977] 1 C.F. 747.

22 Dans la cause récente, non publiée, *Corning Glass Works c. Canada Wire & Cable Co. Ltd.* [no du greffe T-1944-81], le juge Walsh a rejeté une requête présentée par les défendeurs selon la règle 465(5) pour interroger au préalable le co-inventeur d'un brevet, qui était un employé de la demanderesse résidant hors du ressort de la Cour, pour le motif que la Cour ne pouvait précisément émettre un subpoena lui enjoignant de se présenter au Canada pour être interrogé. Les défenderesses avaient invoqué le principe qu'elles avaient droit à une communication complète. Elles avaient également fait valoir qu'elles avaient le droit d'interroger au préalable le co-inventeur parce qu'il était un employé de la demanderesse, relevant de son autorité. L'argument fut rejeté. Le savant juge a conclu qu'il n'aurait été valide que sous l'empire de la règle 465(19) et, même là, il doutait qu'une telle ordonnance eût été bien fondée.

23 Les avocats des défenderesses reprennent avec insistance le même argument, qu'un élément supplémentaire irréfutable vient, selon eux, étayer. Il s'agit du paragraphe 14 de l'affidavit de Robert G. McClenahan, avocat de la demanderesse, assermenté le 14 octobre 1983, et déposé au soutien du mémoire de la réponse de la demanderesse dans sa requête présentée à la Cour de District des États-Unis, Eastern District of Pennsylvania, en vue de faire annuler son ordonnance antérieure relative à la prise des dépositions des inventeurs McCarthy et Glass. Ce paragraphe 14 de l'affidavit se lit comme suit:

[TRADUCTION] 14. Je comprends que Deere soutienne qu'elle ne pouvait pas obtenir une ordonnance de la Cour fédérale du Canada enjoignant à Sperry de faire comparaître les inventeurs pour interrogatoire préalable parce que, "comme ni McCarthy ni Glass ne résident ni ne peuvent être retracés au Canada, il n'existe aucune procédure judiciaire canadienne par laquelle ils peuvent être contraints de fournir un témoignage au Canada ou qui puisse servir dans l'action canadienne pendante": (voir le paragraphe 6 de la demande de Deere). Il est vrai que les inventeurs eux-mêmes ne peuvent être soumis à un subpoena émis par la Cour fédérale du Canada. Néanmoins, les inventeurs relèvent, tous deux, de l'autorité de Sperry. En tant que demanderesse dans l'action canadienne, Sperry a fait appel à

un tribunal canadien et a invoqué la compétence de la Cour fédérale du Canada. Deere avait toute la latitude, et en fait il l'a toujours, de présenter une demande à la Cour fédérale du Canada en vue d'obtenir, non pas une ordonnance enjoignant aux inventeurs de se tenir disponibles pour un interrogatoire préalable, mais enjoignant à Sperry de faire comparaître les inventeurs pour interrogatoire préalable relativement à l'action canadienne.

24 Un aveu contenu dans l'affidavit d'un tiers, qui a été produit par l'une des parties dans des procédures antérieures peut être recevable en preuve contre elle dans un litige subséquent. Voir: Phipson, *On Evidence*, 13 éd. par. 19-22; Cross, *On Evidence* 3e éd., p. 440-441; et *Ex parte Hall*, 19 Ch. D. 580, 583. On peut se demander si une partie est liée par un aveu fait par un avocat au cours des procédures interlocutoires, à moins que les circonstances ne justifient un estoppel. Voir Phipson, précité, par. 20-40.

25 L'aveu consiste essentiellement dans l'affirmation, simple et sans réserve que les deux inventeurs sont sous l'autorité et le contrôle de la demanderesse, conjuguée avec l'opinion des avocats sur ce que la demanderesse aurait pu ou dû faire pour obtenir une ordonnance leur enjoignant de comparaître pour être interrogés ici.

26 Les avocats des défenderesses prétendent que cette allégation contenue dans l'affidavit suffit en soi pour constituer le motif d'une raison spéciale, exceptionnellement, pour ordonner un autre interrogatoire préalable des cédants et inventeurs en vertu de la règle 465(19). Les avocats de la demanderesse répondent que la règle ne vise que des circonstances spéciales et qu'elle ne peut pas être utilisée comme subterfuge à un interrogatoire préalable sous le régime de la règle 465(5). Ils soutiennent, en outre, qu'une autre condition doit être remplie, à savoir que l'interrogatoire préalable de la partie ou du cédant doit être entièrement complété.

27 À mon avis, ce que les avocats de la demanderesse ont déclaré dans la procédure antérieure est recevable comme aveu contre la demanderesse dans la présente procédure. De plus, cette position ajoute une certaine équité à l'encontre de la demanderesse, en accréditant l'argument des défenderesses, selon lequel la demanderesse a adopté des attitudes contradictoires dans les deux procédures, selon le camp où elle se trouvait.

28 Le paragraphe 3 de l'affidavit de James W. Carson à l'appui de la requête stipule que l'interrogatoire des inventeurs est essentiel à la préparation et à la présentation de la preuve des défenderesses. Il ressort de tous les documents que le but de l'interrogatoire est de confronter les inventeurs à leurs affidavits déposés dans les procédures de redélivrance du brevet, afin de découvrir la vraie nature de l'invention à protéger eu égard à l'allégation de la défense que ces affidavits contiennent des représentations fausses et trompeuses. À mon avis, cette matière peut être communiquée. Il s'ensuit qu'un interrogatoire préalable orienté sur ce point ne serait pas une simple cueillette de renseignements à l'aveuglette. Je suis donc convaincu, compte tenu de tous les documents qui me sont soumis, qu'il ne s'agit pas d'un point sur lequel le dirigeant tenu de comparaître de nouveau pour fins d'interrogatoire pourrait se renseigner convenablement et que la prépondérance des probabilités penche pour un autre examen d'une personne bien informée.

29 Dans *Rasins c. Foodcorp Limited*, [1980] 1 C.F. 729, il a été décidé qu'un dirigeant compétent d'une compagnie défenderesse, qui résidait en dehors du ressort mais sous l'autorité de la défenderesse, pouvait en vertu des règles relatives à la communication, être forcé à comparaître pour être interrogé au préalable dans le territoire soumis à cette juridiction. Il s'agissait d'un premier interrogatoire de ce dirigeant, et non d'un autre interrogatoire, mais, selon moi, le principe s'appliquerait également à un interrogatoire en vertu de la règle 465(19).

30 Selon la tendance dominante actuelle, il y a élargissement de la portée de l'interrogatoire préalable.

J'estime donc que les fins de la justice seraient mieux desservies en l'espace si une ordonnance était émise enjoignant à la demanderesse de faire comparaître pour un autre interrogatoire préalable en vertu de la règle 465(19) son dirigeant Horace G. McCarthy, aux mêmes temps et lieu que la nouvelle comparution pour interrogatoire de son dirigeant Joseph A. Brown. Cet interrogatoire de McCarthy n'est pas destiné à donner libre cours à son contre-interrogatoire en général, sur tout le fond de la preuve des défenderesses. Il doit nécessairement se limiter plutôt à la communication appropriée des faits pertinents aux allégations de représentations fausses et trompeuses relatives à la demande de redélivrance du brevet. Le co-inventeur, Emmett F. Glass, n'est qu'un employé de la demanderesse et non un de ses dirigeants. Pour les motifs déjà énoncés, je suis d'avis que rien ne permet l'émission d'une ordonnance pour lui enjoindre d'être interrogé au préalable. À tout événement, je n'émetts aucune ordonnance à son sujet.

31 En conséquence, cette partie de la requête des défenderesses est accueillie sous les réserves formulées ci-dessus.

32 L'autre partie de la requête vise l'obtention d'une ordonnance enjoignant à Joseph A. Brown de comparaître de nouveau, de préférence à Toronto, dans les soixante jours à compter de son émission, afin qu'il réponde à certaines questions qui lui ont été posées à son interrogatoire préalable, qu'il produise les documents qui y ont été demandés et qu'il réponde à toutes les questions pertinentes qui en découlent, le tout tel qu'exposé plus amplement à l'annexe A de la requête.

33 1. La première série de questions porte sur les modifications apportées par la demanderesse aux éléments de base de prototype en prototype au cours de l'évolution de l'invention alléguée; ces allégations sont les suivantes:

Q. 376-377

Q. 4053-4058

Q. 4103

Questions 376-377

34 Dans ces questions, on demande à la demanderesse un résumé des modifications dans les dessins de montage du prototype 1 au prototype 4. Joseph A. Brown, le dirigeant interrogé au nom de la demanderesse, a répondu qu'il était impossible de résumer les centaines de pièces détachées dans la machine et qui changeaient de temps à autre. L'avocat de la demanderesse s'est engagé à voir ce qu'elle pouvait trouver comme dessins de montages de prototypes, mais a refusé de s'engager à fournir le résumé des dessins. La demanderesse devrait respecter son engagement de fournir les dessins des prototypes, si ces dessins existent. Elle n'est pas tenue d'en fournir un résumé. Les défenderesses doivent faire leurs propres calculs ou tirer leurs propres conclusions à partir des dessins ainsi fournis.

Questions 4053-4058

35 Ces questions visent également des modifications de prototype. Le dirigeant interrogé a répondu qu'il y avait des modifications continues d'un niveau de prototype au niveau suivant. Il a déclaré que les défenderesses avaient déjà eu la réponse quant à la nature de ces modifications dans la documentation fournie, et c'est ce que la demanderesse avait de mieux à offrir. Cette question a reçu une réponse suffisamment satisfaisante. En outre, les défenderesses ont leur propre personnel qualifié et peuvent, à l'aide d'experts, au besoin, tirer toutes les conclusions requises de la documentation fournie par la demanderesse.

Question 4103

36 La question était vague et imprécise; elle était combinée avec une autre question et restée en suspens. Elle visait également les modifications de prototypes et entraînait dans le cadre général des questions précédentes. Elle n'a été ni clarifiée ni débattue et, à mon avis, la réponse y a été donnée autant que faire se peut.

37 2. Cette série de questions se rapporte à l'identification ou au dépôt de documents produits au cours de l'instance introduite aux États-Unis, et mettant en cause les parties, ou s'y rapportant, et elle comprend:

Q. 1434-1436

Q. 3239

Q. 3286

Q. 4127

Q. 4197

Question 1434-1436

38 On a demandé au dirigeant interrogé, Joseph A. Brown, s'il voulait s'assurer que certaines photographies qui lui ont été soumises avaient été présentées avec des photographies de la machine Crose, au cours de l'instance américaine, quelques années auparavant. L'avocat de la demanderesse a déclaré qu'il ne s'y engagerait pas. Les motifs de son opposition étaient que la personne qualifiée pour identifier ces photographies était le témoin qui les avait identifiées au procès. Les photographies ont ensuite été marquées comme étant celles que le témoin pensait pouvoir attribuer à la machine Crose. Dans la question suivante, on demandait à la demanderesse de produire des copies de n'importe quelle photographie se trouvant en sa possession. L'avocat de la demanderesse a également refusé de s'y engager. Il a déclaré, durant l'argumentation sur la requête, que sa cliente avait cherché en vain ces photographies.

39 Je décide que ces questions ont reçu des réponses satisfaisantes. La personne interrogée a fait tout son possible en reconnaissant que ces photographies ressemblaient à la machine Crose. La demanderesse ne peut produire des copies de photographies qu'elle n'a pas en sa possession.

40 Qu'en est-il du devoir de s'informer? À mon avis, un dirigeant de société, interrogé au préalable, a un devoir de se renseigner sur les faits dont il n'a pas personnellement connaissance, mais dont d'autres dirigeants, employés ou agents de la société ont connaissance, en leurs qualités respectives. Ce devoir de s'informer ne s'étend pas aux anciens employés, aux témoins dans des procédures antérieures, ou à d'autres tiers qui ne sont pas, au moment de l'interrogatoire sous le contrôle de la société et facilement disponibles pour fournir les renseignements recherchés.

Question 3239

41 Dans cette question, on demande au dirigeant de la demanderesse de se renseigner si un article attribué à un certain professeur Bainer a été effectivement rédigé par lui. L'avocat de la demanderesse a refusé de s'y engager. La question n'a pas été débattue. À mon sens, tout ce que l'avocat des défenderesses pouvait demander à cet égard était d'identifier cet article, en autant que la personne interrogée pût le faire. De toute évidence, la question visait à faire attribuer à un tiers la rédaction d'un article, et si elle est pertinente au litige, elle devrait être prouvée de la façon régulière en citant ce tiers comme témoin au procès. Une plus ample réponse n'est pas requise.

Question 3286

42 Cette question comporte une demande au dirigeant de la demanderesse d'identifier les transcriptions du procès dans l'action antérieure intentée aux États-Unis et de produire des copies de certaines pièces qui ont été déposées. L'avocat de la demanderesse a immédiatement répliqué qu'il ne le ferait pas. Un long débat s'ensuivit entre les avocats au sujet des transcriptions, des pièces et de certaines dépositions enregistrées. À la fin du débat, le résultat était le même. L'avocat de la demanderesse a refusé de répondre de quelque façon que ce soit à la question initiale.

43 L'avocat de la demanderesse a soutenu, au cours de l'argumentation sur la requête, que les défenderesses n'avaient pas droit à l'identification ou la production demandée de ces documents, et a cité à l'appui l'affaire *Ductmate Industries Inc. c. Exanno Products Ltd.* (non publié, no du greffe T-3341-81). Dans cette cause, le juge Muldoon avait décidé que rien ne permettait, en droit, d'émettre une ordonnance pour insérer, dans l'enregistrement d'un interrogatoire préalable, la déposition du témoin donnée dans d'autres procédures qui se sont déroulées aux États-Unis. Il semble que cette question ne visait qu'à faire identifier par le témoin les transcriptions et les pièces. L'avocat des défenderesses prétend que la question ne porte que sur leur identification et non sur leur admissibilité, et que le refus de la demanderesse n'est ni plus ni moins de l'"obstruction". L'avocat de la demanderesse s'en tient à son opposition et au fait que les défenderesses n'ont pas droit à l'identification ou à la production demandée.

44 Le paragraphe 23(1) de la Loi sur la preuve du Canada, S.R. 1970, chap. E-10, prévoit que la preuve d'une procédure ou pièce de certains tribunaux désignés, y compris une cour d'archives des États-Unis d'Amérique ou de tout État des États-Unis d'Amérique, peut se faire dans toute action ou procédure, au moyen d'une ampliation ou copie certifiée de la procédure ou pièce, donnée comme portant le sceau de la cour. Il reste cependant l'obstacle de la *comme law* à surmonter. La règle est bien énoncée dans *Cross, On Evidence*, 3e éd., à la page 453:

[TRADUCTION] La preuve fournie dans une procédure antérieure, impliquant les mêmes parties ou leurs préposés, peut être lue ou exposée au cours d'un procès subséquent, en autant que les questions en jeu soient les mêmes, que le témoin qui a fourni la preuve ne puisse être convoqué, et que la partie à l'encontre de laquelle ou de son préposé cette preuve est offerte ait eu l'occasion de contre-interroger le témoin lorsque la preuve a été fournie...

45 Il existe donc un moyen de produire en preuve, à l'instruction, une preuve fournie dans d'autres procédures entre les mêmes parties ou leurs préposés. En général, les aveux faits à l'interrogatoire préalable n'en font pas partie.

46 La question est justifiée dans la mesure où elle ne s'étendait qu'à la simple identification ou à la production des documents à des fins d'examen et, sous cette réserve, elle devrait recevoir une réponse. Si la demanderesse a en sa possession des copies des transcriptions, des pièces et des dépositions dans les procédures américaines, ces copies devraient être produites pour fins de vérification et d'examen par les défenderesses.

Question 4127

47 Cette question reprend la même stratégie, qui consiste à tenter de faire identifier, par le dirigeant de la demanderesse, un article du professeur Bainer susmentionné, article qui a été déposé comme pièce au cours de l'instruction. Le dirigeant de la demanderesse ne pouvait pas l'identifier comme tel. Toute autre interrogatoire serait vaine. Rien n'oblige le dirigeant de la demanderesse à prendre d'autres renseignements au sujet de cet article. Il n'y a pas lieu de répondre à cette question.

Question 4197

48 À la lecture des transcriptions, cette question est vide de sens. Apparemment, elle se rapportait à des documents soumis au procès américain. Elle a été suivie d'une discussion entre avocats. L'avocat de la demanderesse à la présente requête prétend que les documents mentionnés ont toujours été en la possession d'un tiers et que la demanderesse n'est pas tenue de se renseigner sur des tierces parties ou de produire de preuve. Étant donné le manque de clarté de la question, je décide qu'elle n'est pas pertinente et qu'il n'y a pas lieu d'y répondre.

49 3. Ces questions se rapportent aux déclarations faites par la demanderesse dans sa demande de redélivrance du brevet canadien 924 111, au sujet de la nature de l'invention. Elles comprennent:

Q. 1484

Q. 1486

Q. 1487

Q. 1651

50 L'avocat de la demanderesse allègue que ces questions ne sont pas justifiées. Les motifs de l'opposition sont que le brevet n'a pas besoin de commentaires et que l'interprétation du brevet et de l'invention est une question de droit sur laquelle il appartient à la Cour de statuer. Il prétend en outre que la demanderesse n'est pas tenue d'interpréter le brevet, ni de répondre à des questions d'opinion.

51 Clairement, la règle est qu'on ne peut forcer une partie à répondre en interrogatoire à des questions préalables de nature à donner une interprétation du mémoire descriptif. C'est une question de droit pour la Cour. Il ne convient pas, non plus, durant l'interrogatoire préalable, de poser des questions faisant appel à une opinion, lesquelles, pour peu qu'elles soient admissibles, ne seraient acceptables que si elles étaient posées à un témoin dont les connaissances techniques était mises en doute. Voir: *Western Electric C. c. Baldwin International Radio C.*, [1934] 4 D.L.R. 129 (S.C.C.); *Rivtow Straits Limited c. B.C. Marine Shipbuilders Limited* (1976), 14 N.R. 314; et *Corning Glass Works c. Canada Wire & Cable Ltd.* et autres (non publié).

Question 1484

52 La formulation de cette question revient, semble-t-il, à demander si le témoin avait fait une déclaration au sujet de la nature de l'invention lors de la demande de redélivrance du brevet. Un certain débat s'est engagé entre avocats. On a demandé, en outre, si la position de la demanderesse relativement à cette éventuelle déclaration sur l'invention avait changé aujourd'hui, par rapport à la date de la demande de redélivrance. Le témoin a déclaré qu'il ne pouvait y répondre tant qu'il ne savait pas en quoi consistait cette déclaration. La question peut être posée de nouveau, plus clairement, au cours du nouvel interrogatoire. À mon avis, une partie n'est pas tenue d'exprimer sa position en termes de point de vue, mais seulement de répondre aux questions de faits, relatives aux points en litige. La demanderesse n'est pas tenue de répondre à des questions sur sa position.

Question 1486

53 Cette question concerne le mémoire descriptif ou son interprétation, et il n'y a pas lieu d'y répondre.

Question 1487

54 Cette question est vague et, à mon avis, n'est pas pertinente. Il n'y a pas lieu d'y répondre.

55 Son ambiguïté mise à part, cette question est nettement hypothétique, en ce qu'elle demande d'exprimer une opinion relevant d'une position ou d'un point de vue. Il n'y a pas lieu d'y répondre.

56 4. Question 1512

57 Dans cette question, on demande de produire des calculs effectués par le co-inventeur, Emmet F. Glass, et plusieurs autres, relativement à la machine Crose, calculs que la demanderesse a déposés à l'appui de sa demande de redélivrance. L'avocat de la demanderesse à l'interrogatoire préalable a déclaré qu'il étudierait la demande. L'avocat de la demanderesse à la requête a allégué que la question n'était pas pertinente aux motifs que les calculs effectués par Glass sont suffisamment explicites. Si je saisis bien la question, elle ne vise que la production des calculs mentionnés pour fins d'examen, et rien de plus. Dans ces conditions, la question est parfaitement justifiée. Si les calculs existent toujours et sont en la possession de la demanderesse, ils devraient être produits pour fins d'examen à l'interrogatoire, lors de la nouvelle comparution.

58 5. Les questions regroupées sous ce paragraphe principal et ces sous-paragraphe identifiés par des lettres portent sur l'interprétation et les mémoires descriptifs, et plus particulièrement sur la vitesse du rouleau et des roulements des machines vendues par la demanderesse.

a) Conditionneur de fourrage 460 et prototypes

Q. 1529 - Cette question a reçu une réponse approximative et a été acceptée (voir pièce 5a) jointe à l'affidavit de Carson).

Q. 1548 - Il n'y a pas lieu de répondre à cette question. Le demandeur n'a pas à effectuer de calculs pour la défenderesse lorsque celle-ci dispose des renseignements et des données nécessaires pour effectuer ses propres calculs.

Q. 3690 - On a répondu à cette question dans la réponse aux questions 288 et 3688 (voir pièce 26 jointe à l'affidavit de Carson).

Q. 4233 - Prise isolément, cette question n'est pas claire. Apparemment, elle visait à savoir si la demanderesse est passée d'une bobine à cames à six barres sur sa moissonneuse à une bobine à quatre barres et pourquoi. Je n'y vois rien d'incorrect, et je conclus que la question doit recevoir une réponse.

b) Triturateur 404, éclateur de fourrage 401 et 402

Q. 3318 - Je crois comprendre que l'avocat des défenderesses a retiré cette question durant l'argumentation sur la requête. Quoiqu'il en soit, on y a répondu de façon satisfaisante (voir pièce 5 b) et pièce 26 jointes à l'affidavit de Carson). La demanderesse n'est pas tenue de faire des calculs pour les défenderesses.

Q. 3399 - 3400 - On a répondu à cette question de façon satisfaisante (voir pièce 26 jointe à l'affidavit de Carson).

Q. 3354 - Cette question était ambiguë et ne pouvait recevoir une réponse claire. Il semblerait, par ailleurs, que la réponse ait été donnée et acceptée. Quoiqu'il en soit, la question n'est pas pertinente et une autre réponse n'est pas

requis.

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Q. 4106 - On a répondu à cette question, autant que faire se peut, en répondant à la question 4105 (voir pièce 26 jointe à l'affidavit de Carson).

c) Concasseur de faucheuse 440

Q. 3359 - Cette question a reçu une réponse (voir pièce 26 de l'affidavit de Carson).

Q. 3361 - On a répondu à cette question de façon satisfaisante dans la réponse à la question 3360 (voir pièce 26 jointe à l'affidavit de Carson). La demanderesse n'est pas tenue d'effectuer des calculs pour les défenderesses à partir de dessins produits pour elles.

d) Speedrower 900

Q. 3565-3566

Q. 3587

Q. 3573

Q. 3607

59 L'avocat de la demanderesse soutient que celle-ci a amplement répondu à ces questions autant que faire se peut. Il s'appuie sur la pièce 26 jointe à l'affidavit de Carson pour confirmer le fait que la demanderesse ne dispose pas des dessins ou des renseignements pour répondre à ces questions relatives au Speedrower 900.

60 Q. 3565-3566 - La pièce 26 susmentionnée indique que le Speedrower modèle 900 a été fabriqué pour la demanderesse par un tiers, Hesston, et que la demanderesse n'a jamais eu les dessins de la fabrication de cette machine. La réponse a été que les calculs demandés ne pouvaient pas être effectués à partir des renseignements dont la demanderesse disposait. La question a reçu une réponse satisfaisante.

61 Q. 3587 - Cette question est restée dans le vague. Je suppose qu'elle visait la vitesse périphérique d'un rouleau du Speedrower 900. La réponse pourrait être que la demanderesse ne dispose pas des dessins pour y pouvoir répondre. La question devrait être clarifiée, et le dirigeant de la société demanderesse devrait alors y répondre comme il peut.

62 Q. 3573 - Le témoin a répondu partiellement à cette question. Il semble qu'on puisse trouver le reste de la réponse dans les réponses aux questions 3566 et 3573 dans la pièce 26 jointe à l'affidavit de Carson. On a répondu à la question de façon satisfaisante.

63 Q. 3607 - Ce qui était, à l'origine, une seule question s'est compliqué en une série de questions hypothétiques. Dans la question initiale, on demandait quelles étaient les situations que la demanderesse avait affrontées, et qui avaient entraîné le bouchage des rouleaux de conditionnement. La personne interrogée a répondu qu'elle l'ignorait. On a répondu à la question de façon satisfaisante. À mon avis, les questions qui restent ne sont pas pertinentes, et il n'y a pas lieu d'y répondre.

64 6. Les questions regroupées dans cette catégorie se rapportent aux paragraphes 2 et 14 de la défense des défenderesses et au paragraphe 1 des détails de l'opposition, relativement à l'erreur attribuée à l'agent des

Q. 1676

Q. 1678

Q. 1719

65 Q. 1720

66 L'avocat de la demanderesse allègue que les questions ne sont pas pertinentes et qu'elles touchent des documents privilégiés. Il prétend, en outre, qu'elles constituent une cueillette de renseignements à l'aveuglette. L'avocat des défenderesses soutient qu'elles ont simplement plaidé que la demande de redélivrance était délibérément fausse et trompeuse, pour soulever l'allégation de fraude et écarter ainsi tout privilège procureur-client.

67 Pour situer le problème dans sa vraie perspective, il y a lieu de rappeler brièvement les principes juridiques qui s'appliquent.

68 Les communications entre un avocat et son client aux fins d'obtenir un conseil juridique sont privilégiées, qu'elles soient litigieuses ou non. Le privilège juridique professionnel ne s'étend pas aux agents de brevets, ces derniers n'étant pas membres de la profession juridique. Mais le privilège existe pour les communications entre un client et un agent de brevets, si elles sont dirigées par l'intermédiaire de l'avocat du client et effectuées en vue ou au cours du procès. Une simple allégation de fraude dans les plaidoiries ne suffit pas à écarter la revendication du privilège des communications entre avocat et client quant aux documents. Il doit exister quelque preuve au moins pour établir une apparence de fraude. Voir la cause récente, non publiée, de *Montreal Fast Print (1975) Ltd. c. Polylok Corporation* dans laquelle le juge Walsh fait une revue judicieuse et remarquable de la jurisprudence. Il est également essentiel qu'un brevet, une fois délivré, soit valide à première vue. Il existe des dispositions législatives à cet effet. Voir l'article 47 et le paragraphe 55(1) de la Loi sur les brevets, S.R.C. 1970, chap. T-4 et l'arrêt *Lowell Manufacturing Co. c. Beatty Bros. Ltd.* (1964), 41 C.P.R. 18, aux pp. 39-41.

69 Examinées sommairement, les questions visaient la production de toutes les communications entre la demanderesse et ses agents de brevets canadiens quant aux procédures d'interférence entre un brevet américain et un brevet canadien, certaines notes ou rapports rédigés par un certain M. Kennedy, et des renseignements fournis aux agents de brevet canadiens lors d'une réunion portant sur la machine Crose. Il s'agit en réalité d'une ordonnance de taille. Il n'y a aucun élément, ou il y en a trop peu, devant moi, pour me permettre de statuer sur la revendication d'un privilège. Les défenderesses auraient pu demander plus tôt une ordonnance en vue d'obtenir la production des documents qu'elles tentent d'obtenir à présent par voie d'interrogatoire préalable. Elles n'ont fourni aucune explication de la raison pour laquelle elles ne l'ont pas fait. Accéder actuellement à leur demande constituerait, à mon avis, un abus des procédures régulières de communication de la preuve. De plus, les questions sont trop imprécises et mal fondées pour recevoir une réponse. Elles laissent subsister, en outre, un doute sérieux sur leur admissibilité dans un interrogatoire préalable, comme étant pertinentes aux faits invoqués par rapport à la preuve requise. Le fardeau de la preuve de fausses représentations délibérées ou volontaires dans une requête de redélivrance du brevet incombe carrément aux défenderesses. Les registres du Bureau canadien des brevets sont accessibles. Les défenderesses peuvent contraindre une personne, par voie de subpoena, à produire tout document qu'elles jugent nécessaire pour les fins du procès.

70 À mon avis, ces questions ne sont pas pertinentes à ce stade des procédures, et la demanderesse n'est pas tenue de produire les documents demandés.

71 Il sera donc statué sur la base de ce qui précède, et une ordonnance sera émise en conséquence. Les frais suivront l'issue de la cause.

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Traduction certifiée conforme : [signature illisible] pour Nabil Kamel-Toueg

qp/s/qlbdl/qlhbb/qljub

Indexed as:

Champion Truck Bodies Ltd. v. Canada

Champion Truck Bodies Limited (Plaintiff)

v.

The Queen in Right of Canada (Defendant)

[1986] 3 F.C. 245

[1986] F.C.J. No. 932

Court File Nos. T-970-85, T-2130-85

Federal Court of Canada - Trial Division

Strayer J.

Heard: Ottawa, June 26, 1986.

Judgment: Ottawa, July 4, 1986.

Practice -- Discovery -- Examination for discovery -- Motion to exclude defendant's representative from examination for discovery of plaintiff's representative -- Motion dismissed -- R. 465(20) giving Court jurisdiction -- Party or representative entitled to attend court proceedings except in unusual circumstances - - Principle applying even more to examinations for discovery -- Important that examining counsel be well instructed during examination -- Type of evidence possible at examination and purpose of examination reducing relevancy of concerns about witnesses tailoring evidence in light of knowledge of each others' evidence -- Special circumstances, required to exclude representative, not disclosed -- Federal Court Rules, C.R.C., c. 663, R. 465.

Cases Judicially Considered

Considered:

Green v. R., [1980] 2 F.C. 524 (T.D.).

Counsel:

Richard P. Bowles, for the plaintiff.

Judith McCann, for the defendant.

Solicitors:

Hough & Bowles, Ottawa, for the plaintiff

Deputy Attorney General of Canada, for the defendant.

The following are the reasons for order rendered in English by

1 STRAYER J.:-- The plaintiff in this action and in another action between the same parties, T-2130-85, brought an application purportedly under Rule 465 [Federal Court Rules, C.R.C., c. 663] for an order, *inter alia*, declaring that:

[page246]

... the Defendant ... is ... not entitled to have present at the discovery of the Plaintiff's representative the person whom the Defendant has chosen to produce as its representative to be examined for discovery.

An accompanying affidavit disclosed that on the day agreed upon by counsel for the examination of a representative of the plaintiff, counsel for the defendant had with her one Bernard Fournier, a representative of the defendant who was the person designated to be examined for discovery the next day by counsel for the plaintiff. Counsel for the plaintiff objected to Fournier being present during the examination of the representative of the plaintiff. The examination did not proceed and counsel brought these motions, one in each action. I dismissed both motions, gave brief oral reasons, and indicated that I would give written reasons having regard to the novelty of the question.

2 At the outset I had some doubts as to my jurisdiction to give such directions. I was finally satisfied that, while there is no precise authority in Rule 465 to this effect, the matter could be treated as one in which the plaintiff's representative had refused to be examined with Fournier present, it then being a matter under paragraph 465(20) for the Court to determine whether there was "reasonable excuse" for this refusal. I also noted the decision of Mahoney J. in *Green v. R.*, [1980] 2 F.C. 524 (T.D.) where he made a determination as to whether an expert witness was entitled to be present to assist counsel in the examination of a party in opposition.

3 In reaching the conclusion which I did, I started with the proposition that an individual normally is entitled to attend court proceedings to which he is a party. Where the party is not a natural person but a corporation or the Crown, then such party is entitled to have a representative present. Fournier is a representative of the defendant in this action.

4 My reading of the cases suggests that while there are exceptions to this principle such exceptions are few and would involve unusual circumstances. Even in a trial, where a party or the instructing representative of a party is an intended witness, where an order is made for the exclusion of other witnesses prior to their testimony the Court would not normally exclude such a person. This is so even though the practice is to make [page247] exclusionary orders whenever so requested. This obviously reflects the importance attached to the right of a party to be present and to instruct counsel throughout the case.

5 In some respects I believe that it is even more important that a party's representative be present during an examination for discovery of the opposing party. It is in the interests of justice that examinations for discovery should be complete and this implies that the questioning should be as relevant as possible. The object is to explore fully the issues raised by the pleadings, to understand the position of the party being examined and to gain admissions from him. This is all in furtherance of the goal of narrowing the issues and reducing as much as possible matters to be determined at trial. All of this underlines the importance of examining counsel being well instructed by his client during the course of the examination.

6 The argument of the plaintiff here is essentially that the presence of the defendant's representative during the examination of the plaintiff's representative is "unfair" because it could enable the former to "tailor" his "evidence" in the light of the "evidence" of the latter. No basis for this apprehension is stated in the supporting affidavit. It is simply put forward as a general proposition. I find this inadequate for two reasons. First, I think it overemphasizes the role of an examinee as a "witness". An examinee is not necessarily giving "evidence" of his personal knowledge and observations as does a witness at trial, but rather is there to state the position of the party he represents. In doing so he may be giving purely hearsay evidence. The purpose of the examination is not to obtain disclosure of the intended evidence of the particular examinee but rather of facts relevant to the pleadings which are within the knowledge of the other party. These considerations in my view reduce considerably the relevancy of concerns about witnesses to a particular incident being able to "tailor" their evidence in the light of knowledge of each other's evidence. Secondly, for reasons stated earlier as to the importance of a party's representative being present with his counsel, it is unacceptable in my view to take the view that such [page248] a person can never be present when the opposite party is being examined if he is himself to be examined in future. It would have to be very special circumstances to justify the exclusion of such a person and the plaintiff's material discloses no such circumstances here. 312

7 For these reasons the motions were dismissed with costs in the cause. These reasons apply equally, of course, to the motion brought in action T-2130-85.

qp/s/qllls

Case Name:
Williamson v. Canada (Attorney General)

Between
The Attorney General of Canada representing the Minister
designated under the Cultural Property Export and Import
Act, appellant (respondent), and
Joan A. Williamson, respondent (applicant)

[2003] F.C.J. No. 1425

[2003] A.C.F. no 1425

2003 FCA 361

2003 CAF 361

2003 D.T.C. 5658

125 A.C.W.S. (3d) 966

Docket A-679-02

Federal Court of Appeal
 Edmonton, Alberta

Rothstein, Sexton and Sharlow JJ.A.

Heard: September 30, 2003.
 Oral judgment: September 30, 2003.

(20 paras.)

Practice -- Discovery -- What documents must be produced -- Privileged documents, procedure for claiming privilege.

Appeal by the Attorney General of Canada from an order by the Federal Court to produce documents. The Attorney General had claimed privilege over the documents. The respondent, Williamson, donated property to the Fort Saskatchewan Historical Society. The Society applied for designation under the Cultural Property and Import Act. This would have had favourable tax consequences for Williamson. The request for designation was refused. Williamson sought production of certified documents before the decision maker. Pursuant to a court order, the Attorney General filed the document for which privilege was claimed with the court in a sealed envelope. The order did not contemplate the filing of affidavit evidence and no affidavit evidence was provided. The judge found that the Attorney General did not meet the burden of

proving privilege. The Attorney General argued that the document was obviously privileged on its face.

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HELD: Appeal allowed. Although the judge did not err in finding that the burden was not met, given the importance of the principle of solicitor-client privilege, the Attorney General should have been given the opportunity to file affidavit evidence. The matter was returned to the Federal Court for redetermination following the filing of affidavit evidence.

Statutes, Regulations and Rules Cited:

Cultural Property and Import Act.

Counsel:

Tracy King, for the appellant.

Priscilla Kennedy, for the respondent.

The judgment of the Court was delivered by

- 1 **SEXTON J.A.** (orally):-- The Attorney General of Canada appeals from the Order of the Federal Court ordering production of a document upon which the Attorney General of Canada claims solicitor-client privilege.
- 2 The Respondent donated property to the Fort Saskatchewan Historical Society which in turn applied for Designation pursuant to the Cultural Property and Import Act. Such designation, if obtained, could have produced certain favourable tax consequences for the Respondent.
- 3 The request for designation was refused.
- 4 The Respondent filed an application for judicial review of that decision which application contained a request for certified documents which were before the decision maker.
- 5 The Appellant refused to produce one document, on the basis of solicitor-client privilege.
- 6 The Prothonotary gave the following direction on September 9, 2002:
 - "1. The Tribunal shall have ten (10) days from the date of this direction, to serve and file supplementary objections by reference to the specific items sought by the applicant.
 2. The applicant shall have twenty (20) days from service of the Tribunal's further objections to serve and file a response to the objections.
 3. The Tribunal shall have ten (10) days from service of the response to serve and file a reply, if any.
 4. Either party may request or the Court may direct that the matter be heard."
- 7 The September 9, 2002, Order was amended on October 3, 2002 to read as follows:

- (a) The applicant shall have until no later than October 22, 2002, to serve and file a response to the objections.
- (b) The Attorney General shall have ten (10) days from service of the response to serve and file a reply, if any.
- (c) The applicant will set the matter down for hearing, at General Sitting, following receipt of the reply or the date on which the reply is due.
- (d) The Attorney General has leave to file copies of the documents for which privilege is claimed under seal, for the purposes of the hearing judge or prothonotary.
- (e) If not filed with the Attorney General's further objections, the privileged documents shall, in any case, be filed no later than ten (10) days prior to the hearing date.

8 In accordance with the Direction, the document for which solicitor-client privilege is claimed was filed in a sealed envelope with the Court.

9 No affidavit evidence was filed by the Attorney General of Canada to support the assertion that the document is subject to solicitor-client privilege. The Attorney General of Canada did file the document itself in a sealed envelope, and the letter of objection dated September 18, 2002.

10 The Motions Judge said in the Reasons:

"The Respondent submitted no evidentiary foundation to support the assertion that the challenged document is subject to solicitor-client privilege. The document was produced to the Court in a sealed envelope. I have reviewed the document and, in the absence of an affidavit from the Respondent setting forth the relevant facts and circumstances relating to the document, I am unable to conclude that the document reflects legal advice as opposed to a legal argument, as alleged by the Applicant. The affidavit of Ms. Romans fails to show otherwise."

11 The law is clear that the burden of establishing solicitor-client privilege lies with the person who seeks to invoke the privilege.

12 The Attorney General of Canada argues that the document for which privilege is claimed is obviously privileged on its face.

13 The Court, having examined the document, is of the view that it may well be privileged but we are unable to conclude that Madam Justice Heneghan made a palpable and overriding error in concluding there was insufficient evidence to establish this. What is arguably lacking is evidence from the Appellant that it was seeking legal advice and that such advice was obtained as evidenced by the particular document in question, and that it was at all times contemplated by the Appellant that the advice obtained would be confidential. In particular, there was lacking evidence of a solicitor-client relationship between the decision maker and the author of the document in question.

14 The Appellant, however, alleges that the direction issued by the Prothonotary dated September 9, 2002, did not contemplate the filing of affidavit evidence and for this reason none was filed.

15 While it might be argued that the Appellant should have filed an affidavit containing the required information, in spite of the Direction, we are of the view, because of the importance of the principle of solicitor-client privilege, that the Appellant should not be deprived of the opportunity to do so now.

16 The Appellant requested, as alternate relief on the appeal, that it be given the opportunity, and we agree it should be provided in the circumstances.

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17 The Respondent argued that such document would, in any event, constitute legal argument before the Minister and would therefore be produceable. This question will only be resolved once the Appellant has provided affidavit evidence.

18 It is clear, however, that solicitor-client privilege can apply when the client is a department of government and the advising solicitors are in the employ of the Department of Justice.

Canadian Jewish Congress v. Canada (1995) 93 F.T.R. 172 (T.D.)

19 The appeal will therefore be allowed and the matter will be returned to the Federal Court for redetermination following the filing of any affidavit evidence which the Appellant may wish to file. The Appellant shall have until October 20, 2003, to file such Affidavit.

20 There will be no costs.

SEXTON J.A.

cp/e/qw/qlspg

Indexed as:

Stuart Olson Construction Inc. v. Sawridge Plaza Corp.

Between

**Stuart Olson Construction Inc., plaintiff, and
Sawridge Plaza Corporation, Sawridge Holdings Ltd. and
Sawridge Band, defendants**

And between

**Everall Construction Limited, plaintiff, and
Stuart Olson Construction Inc., defendant, and
Sawridge Plaza Corporation, Sawridge Holdings Ltd. and
Sawridge Band, third parties**

[1995] A.J. No. 953

[1996] 2 W.W.R. 396

34 Alta. L.R. (3d) 417

176 A.R. 120

58 A.C.W.S. (3d) 387

Action Nos. 9003-08301 & 9003-02583

Alberta Court of Queen's Bench
Judicial District of Edmonton

Dea J.

Judgment: October 18, 1995. Filed: October 19, 1995.

(14 pp.)

Practice -- Discovery -- What documents must be produced -- Privilege -- Lawyer-client communications.

The defendants applied for production of documents relevant to the state of mind of the plaintiff during negotiations and execution of various agreements entered into with the defendants S Ltd., S Corp. and S Band. The plaintiff claimed solicitor client privilege. An officer of the plaintiff admitted on discoveries that the plaintiff received legal advice from its solicitors prior to the execution of the documents and that the legal bills incurred for that advice had been charged to the defendant's account. The plaintiff also argued that the S group of companies was a vehicle of the Band and that all billings, correspondence and demands for payment were directed to the Band. The defendant argued that the plaintiff raised as an issue its state of mind by claiming during the discovery that it always understood that it was contracting with the Band. The

defendant said that this allegation put into issue the communications between itself and its solicitor with regard to the formal agreements.

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HELD: The application was dismissed. Solicitor-client privilege was not waived by disclosing that a solicitor's advice was obtained. The plaintiff did not introduce the question of legal advice as supportive of its position on the appropriate characterization of the relationship between the Band and the defendant companies nor of the relationship between the plaintiff and the defendants. The plaintiff made no claim that any legal advice was the foundation of its reliance on acts and representations of the defendants. The plaintiff's state of mind was formed by its own experience and history with the defendants.

Counsel:

Graham McLennan, for the Sawridge Band.

James Odishaw, for Sawridge Plaza Corporation and Sawridge Holdings Ltd.

William Kenny, Q.C., for Stuart Olson Construction Inc.

REASONS FOR DECISION

1 DEA J.:-- This is an application by the defendants for production of documents said by the plaintiff to be protected from disclosure by solicitor client privilege.

2 By an agreement in writing dated 8 October 1988 the plaintiff and the defendant, Sawridge Holdings Ltd., entered into a contract for the construction of a certain project by the plaintiff as therein provided. In January of 1989 the defendant Sawridge Holdings Ltd. assigned its interest in that contract to the defendant Sawridge Plaza Corporation. The plaintiff was made a party to that agreement and was also a party to a further agreement with the defendant Sawridge Plaza Corporation. Those latter contracts were both dated the 1st of January 1989.

3 On the 28th of February 1989 the plaintiff wrote to the defendant Sawridge Plaza Corporation in these terms:

We enclose one (1) copy of the executed Stipulated Sum Contract as well as four (4) copies of your Assignment and Novation Agreement as well as two (2) copies of our proposed Assignment Agreement.

Our solicitors proposed this revised agreement to permit Stuart Olson to require performance under the construction contract from either of Sawridge Plaza Corporation or Sawridge Holdings Ltd. In addition, Sawridge Plaza Corporation may require performance by Stuart Olson of its obligations under the contract.

4 Subsequently, differences arose between the parties and the plaintiff brought action against the defendants Sawridge Holdings Ltd. and Sawridge Plaza Corporation for monies alleged to be unpaid on the construction contract. Counter claims and third party actions were also instituted.

5 In March of 1994 the plaintiff applied for and was granted permission to add Sawridge Band as a party defendant to the actions. The plaintiff now pleads that the defendants Sawridge Holdings Ltd. and Sawridge Plaza Corporation were acting as agents for the defendant Band.

6 By Notice of Motion the defendants applied for the following order.

Directing Stuart Olson Construction Ltd. to produce all documents, including the documents in the possession of Cook Duke Cox, relevant to the state of mind of Stuart Olson Construction Ltd. during the negotiations and execution of the alleged Agreements Stuart Olson entered into with Sawridge Plaza Corporation, Sawridge Holdings Ltd. and/or Sawridge Band.

7 The grounds upon which the application is based:

1. Stuart Olson Construction Inc., during Examination for Discovery, waived privilege to any Documents located in the files of Cook Duke Cox when Stuart Olson Construction Inc. put its state of mind during the negotiations and the execution of alleged Agreement into issue.
2. These Documents are relevant to the state of mind of Stuart Olson during the period of time it negotiated and executed the alleged Agreements which is central in these actions.
3. Since Stuart Olson has requested payment of its legal fees as an expense of the Agreement, Sawridge Plaza Corporation and Sawridge Holdings Ltd. are entitled to review the file in order to determine if this account, and the works related thereto, are expenses that they are legally obligated to pay.

8 In Discoveries conducted in April and May of 1995 the officer produced by the plaintiff (Mr. Eger) admitted that the plaintiff had received legal advice from its solicitors prior to execution of the project contract in 1988 and the Assignment and Novation Documents in 1989 and that the legal bills incurred for that advice had been charged by the plaintiff to the defendant's account.

9 At the same Discovery or series of Discoveries the following exchange took place between Mr. Odishaw, counsel for the defendants, Sawridge Plaza and Sawridge Holdings, Mr. Oliveira, counsel for the plaintiff and Mr. Eger, the plaintiffs officer:

Q. Mr. Odishaw: Is it the position of Stuart Olson that all of the contracts that Stuart Olson ever had, including the work on the Sawridge Hotel in Jasper and the Sawridge Hotel expansion in Slave Lake and the shopping centre in Slave Lake, were contracts with the Band?

A. Mr. Eger: Yes.

Q. Mr. Odishaw: And only the Band?

A. Mr. Eger: Yes

Q. Mr. Odishaw: And that Stuart Olson was always looking to the Sawridge Band to pay for whatever works were done by Stuart Olson?

A. Mr. Eger: Yes.

Q. Mr. Odishaw: And that all of the dealings were always with the Band?

Q. Mr. Oliviera: What do you mean by dealings Mr. Odishaw:

Q.. Mr. Odishaw: In terms of construction, works that were being done?

A. Mr. Eger: Or representatives of the Band.

10 At the same Discovery or series of Discoveries the same plaintiffs officer was examined by Mr. McLennan, counsel for the defendant Band. During that Discovery the plaintiffs officer testified that legal advice was received from the solicitors respecting the written contracts. Solicitor client privilege was claimed with respect to those legal services and the invoices.

11 Further in the Discovery the plaintiffs officer gave testimony as to the plaintiffs understanding and knowledge of the agency relationship between the defendants, Sawridge Plaza and Sawridge Holdings on the one hand and the defendant Sawridge Band on the other.

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Q. Mr. McLennan: Now, sir, are you aware that Stuart Olson has done projects for a Sawridge corporation prior to this shopping centre construction in '88, '89?

A. Yes.

Q. And what projects were done before the October '88 period for the Sawridge corporation if I can use that phrase?

A. The expansion of the Sawridge Hotel in Slave Lake. And I believe the construction of the Sawridge Hotel in Jasper.

Q. And approximately when were those projects done?

A. The Slave Lake hotel I believe was approximately 1985, 1986. The Jasper hotel, I don't know.

Q. And do you know what corporation those two projects were done for?

A. My understanding is they were done for the Band.

Q. And how do you come to that understanding?

A. Because it is my understanding that all the work that we have done for Sawridge was done for the Band.

Q. How do you come to that understanding?

A. Because the projects are being done, as I understand it, for the Chief who acts for the Band, and all of the corporation that Sawridge has acted under are all working for the benefit of the Band. That's my understanding.

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Q. When did Stuart Olson come to this understanding that you have described to us, that any work done for any Sawridge corporation is work being done for the Sawridge Indian Band?

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- A. Well, I can't answer that in that it would have been some officer of Stuart Olson involved with the first project we ever did with Sawridge that would have come to that determination, and wasn't involved in that project.
- Q. And why is it that Stuart Olson didn't have the contract, D-4, entered into the Sawridge Indian Band?
- A. Well, it is our understanding that we did, that Sawridge Holdings Ltd. was a vehicle of the Band, and the corporation or the vehicle that they chose to use for this project is the part of the undertaking I took earlier, to determine why we are using that particular name in our original proposal letter which resulted in the contract being signed.

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- A. Well, we are taking the position that Sawridge Holdings Limited and the Sawridge group of companies were a vehicle of the Band, and therefore all of the billings that have been produced, all of the correspondence and demands for payment were directed at the Indian Band.

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- A. No, other than I have given you my understanding of the relationship, and I think I have undertaken to clarify some things with respect to other officers of Stuart Olson and that may fall into that same category. I have given you -- my understanding as an officer of Stuart Olson is that those are one and the same, that Holdings Ltd. was an agent or was a vehicle being used by the Band for the purposes of developing a shopping centre for the good of the members of the Band.

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- A. My understanding is that all the work we have done with Sawridge has been with the Band. As far as back as I am aware or any conversations I have had Stuart Olson relative to the work with the Band, we have always had discussions with Chief Twinn who purported himself to be the Chief of the Band, ultimate authority for all that the Band does, and always he was the party in which we were formalizing contracts with. So we were always dealing with the Band regardless of the entity or vehicle that they put forward.

12 As mentioned earlier, the defendants argue that the plaintiff has raised as an issue in the lawsuit its state of mind during the negotiations and execution of the agreements. The defendants say that this has been done by the plaintiff claiming during the Discovery process that it always understood that it was contracting with the defendant Band. The defendants say that this allegation puts into issue the communications between itself and its solicitor with regard to the formal agreements.

The Law

13 In *Slavutych v. Baker* (1976) 55 D.L.R. (3d) 224 at 228 the Supreme Court of Canada approved the following general statement respecting the law of privilege.

14 The four conditions that must exist before privilege is extended are:

- (i) The communications must originate in a confidence that they will not be disclosed.
- (ii) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
- (iii) The relation must be one which in the opinion of the community ought to be sedulously fostered.
- (iv) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation.

15 In *Solosky v. R.* (1979) 105 D.L.R. (3d) 745 the Supreme Court of Canada addressed the issue of the legal professional privilege:

The direct communication between a solicitor and client is protected from disclosure by legal professional privilege. The privilege can only be claimed document by document. Each document in which legal professional privilege is claimed must:

- (i) be communicated between solicitor and client;
- (ii) entail the seeking or giving of legal advice; and
- (iii) be intended to be confidential by the parties.

16 Here the plaintiff acknowledges that it obtained advice from its solicitors with respect to the agreements in question and goes on to say that such communications are privileged as communications between solicitor and client and are not subject to production.

17 Solicitor client privilege protects such communications unless the privilege is waived. A waiver may occur intentionally by the client expressly waiving it. Waiver may also occur under some circumstances by implication. Where there is a waiver, either intentionally or by implication, a disclosure of all or part of what was communicated under the umbrella of privilege may have to be disclosed in order to answer the demands of fairness and consistency. In general, full disclosure is necessary even when the waiver is only a partial one. This will be so where only by seeing the whole of the communication between the solicitor and the client can fairness and consistency as between the litigants be assured.

18 Counsel for the parties have in their filed briefs set out several of the many cases touching on these matters. In *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* 3 Alta. L.R. (3d) 210 Berger J. addresses the issue of privileged communications. After discussing *Allarcom Ltd. v. Canwest Broadcasting Corp.* (1987), 19 B.C.L.R. (2d) 167; *Lloyd's Bank Canada v. Canada Life Assurance Co.* (1991) 47 C.P.C. (2d) 157; *United States v. Exxon Corp.*, 94 F.R.D. 246 (Columbia Dist. Ct. 1981) and *Nowak v. Sanyshyn* (1979) 23 O.R. (2d) 797 dealing with cases touching on the "state of mind" the learned trial judge says at 214:

None of these cases, in my opinion, is authority for the proposition that whenever and however state of mind is placed in issue, knowledge of the law is invariably relevant and solicitor-client privilege will yield. I am comforted in this view by the following statement by Van Camp J. in *Lloyd's Bank* (supra) at page 167:

"There is not a waiver in every instance where the state of mind is in issue".

Berger J. also refers to *Hartz Canada Inc. v. Colgate-Palmolive Co.* (1988), 27 C.P.C. (2d) 152.

19 Madam Justice Van Camp adds at page 168: "Certainly it (solicitor-client privilege) will not be waived where it is the person who seeks the information that has raised the question of reliance."

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20 But, Berger J. comments:

I would not, with respect, adopt so rigid a formulation. In a proper case, considerations of fundamental adjudicative fairness may be so compelling that the court may be persuaded to order disclosure of an adverse party's legal advice though such solicitor-client communications were not voluntarily placed in issue by that party.

Having made that point the learned trial judge then proceeds:

Such cases, it seems to me, would be rare, indeed. The court will not lightly penetrate the shield of solicitor-client privilege in reliance upon unilateral assertion of an issue by an adverse party.

and on page 214 the court says:

In the case at bar, I am of the view that the communications between the Caterpillar defendants and their solicitors are not legitimately brought in issue in this action in any fashion - neither by voluntary injection by the Caterpillar defendants nor by unilateral assertion of the plaintiff. To the extent that the corporate state of mind or intent of the Caterpillar defendants is legitimately in issue, it does not follow that Caterpillar's knowledge or appreciation of the law is relevant.

I am mindful of the pleadings, of the testimony of the witnesses to date, and of the writings received in evidence. The Caterpillar defendants rely neither on the acts and representations of the plaintiff, nor, for any purpose, upon the legal advice received by them from time to time from their solicitors.

During the course of argument, counsel for the Caterpillar defendants stated: "There is no defence put forward that Caterpillar relied on legal advice, that its actions were lawful under Canadian law, U.S. law, or any law in the Caterpillar world, so to speak." In answer to a question put by the court, he went on to confirm that the Caterpillar defendants do not introduce or interject the question of legal advice as a defence or as supporting their positions.

21 The evidence presented on this application is:

- (a) that the solicitors gave advice to the plaintiffs respecting the main construction contract and the assignment
- (b) that the plaintiff charged the accounts for such advice to the defendants
- (c) that the plaintiffs "state of mind" respecting the legal relationship between the defendants Sawridge Holdings and Sawridge Plaza on the one hand and the defendant Sawridge Band on the other was created not by any legal advice or consultation with its solicitors but by the plaintiffs history of negotiation between itself and the Chief of the Band going back several years prior to the formation of either the main construction contract or the assignment.

22 The 28 February 1989 letter (supra) in speaking of advice from the plaintiffs solicitors is merely explanatory of the changes made in those documents by the plaintiff. Solicitor-client privilege is not waived by disclosing that a solicitor's advice was obtained. It is waived when the evidence shows that the client by his words or actions held a view or followed a course because of advice given to him or perhaps not given to him by his counsel and that he relied on this act or omission for resolution of an issue at trial. **324**

23 As in the Caterpillar case (supra) the plaintiff here does not introduce or interject the question of legal advice as supportive or otherwise of its position on the appropriate characterization of the relationship between the defendant Band and the defendant corporations nor of the relationship between the plaintiff and the defendants.

24 Here, while it is true that the plaintiff has raised in its pleadings reliance on certain acts and representations of the defendants, it is equally clear that it makes no claim that any legal advice has formed or has been the foundation of its reliance. Indeed, though perhaps characterized as a "state of mind" issue it seems to me that this issue is better characterized as a simple disputed issue of fact. And an issue of fact whose resolution cannot be assisted by disclosing any advice its solicitors may have given to it. In saying this recognize that the evidence is that the plaintiffs "state of mind" on this issue was formed by its own experience and history with the defendants and that the plaintiff has not introduced or interjected the question of legal advice in support of its position.

25 Accordingly, the defendants application is refused.

DEA J.

qp/s/ala/mjb/DRS/DRS/DRS

Federal Court



Cour fédérale

Date: 20110923

Docket: T-1254-92

Citation: 2011 FC 1091

Vancouver, British Columbia, September 23, 2011

PRESENT: The Honourable Mr. Justice Beaudry**BETWEEN:**

**CHIEF JOHN ERMINESKIN,
LAWRENCE WILDCAT, GORDON LEE,
ART LITTLECHILD, MAURICE WOLFE,
CURTIS ERMINESKIN, GERRY
ERMINESKIN, EARL ERMINESKIN, RICK
WOLFE, KEN CUTARM, BRIAN LEE,
LESTER FRAYNN, THE ELECTED CHIEF
AND COUNCILLORS OF THE ERMINESKIN
INDIAN BAND AND NATION SUING ON
THEIR OWN BEHALF AND ON BEHALF
OF ALL THE OTHER MEMBERS OF THE
ERMINESKIN INDIAN BAND AND NATION**

**Plaintiffs
(Respondents)**

and

**HER MAJESTY THE QUEEN IN RIGHT
OF CANADA, THE MINISTER OF INDIAN
AFFAIRS AND NORTHERN DEVELOPMENT,
AND THE MINISTER OF FINANCE**

**Defendants
(Applicants)**

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is a motion by the Crown Defendant (the Crown) made pursuant to Rule 51 of the *Federal Courts Rules*, SOR/98-106 (Rules), for an order allowing the appeal and setting aside the Order of Prothonotary Lafrenière (Order) dated May 17, 2011, in which he found that the Crown

has waived solicitor-client privilege through the filing of an affidavit in support of a motion for leave to amend its statement of defence.

[2] For the reasons that follow, the appeal shall be dismissed.

Brief Statement of Factual Background

[3] Action T-1254-92 has been split into phases. The first two phases of the action were tried before Mr. Justice Max Teitelbaum between 2000 and 2004. On December 22, 2004, during the closing arguments of the trial of the two first phases, the respondent (Ermineskin) submitted that the Crown's pleadings of a limitation defence were inadequate. The Crown brought a motion to amend its pleadings to include express reference to certain limitations provisions (the 2004 amendment application). Ermineskin opposed the 2004 amendment application on the basis that the Crown offered no explanation for the delay in raising these limitations defences.

[4] On January 20 and 21, 2005, the 2004 amendment application was heard by Mr. Justice Teitelbaum, who was critical of the Crown's delay in requesting leave to amend and its failure to adduce affidavit evidence to explain the delay. While he permitted the amendments to refer specifically to sections of the *Alberta Limitation of Actions*, RSA 1980, c L-15 (*Alberta Limitation of Actions*), the amendments in relation to the *Federal Court Act*, RSC 1985, c F-7 (*Federal Court Act*) and the *Ontario Limitations Act*, RSO 1980, c 240 (*Ontario Limitations Act*) were denied. He further stated that he was not determining the issue of whether the Crown's pleadings, as they existed without the amendments, were sufficient to make all of its limitations arguments.

[5] By judgment dated November 30, 2005, Mr. Justice Teitelbaum dismissed the claims in the first two phases of the proceedings. Subsequent appeals were dismissed by the Federal Court of Appeal and by the Supreme Court of Canada. The proceedings were reactivated in June 2010 once all appeals were exhausted. The remaining phases required further document production and discoveries, which are set to continue until the end of 2011. No trial dates are set for these phases.

[6] On December 23, 2010, the Crown delivered a notice of motion seeking an order allowing it to amend its statement of defence to include an express reference to various sections of the *Alberta Limitation of Actions*, the *Federal Courts Act*, and the *Ontario Limitations Act*, (the 2010 amendment application).

[7] In support of the 2010 amendment application, the Crown's Motion Record includes an affidavit sworn by Ms. Lynda Sturney (the affidavit), a team leader in the Calgary office of the Litigation Management and Resolution Branch of the Department of Indian and Northern Affairs, which provides the contextual background leading to the Crown's decision to seek leave to amend its statement of defence in December 2004. Particularly, paragraph 12 reads as follows:

I am advised by my counsel that the Crown believed that its existing pleadings were adequate and it was entitled to rely upon s. 39(2) of the *FCA* and the other specific sections of the Alberta and Ontario limitations legislation. However, out of an abundance of caution, on December 22, 2004, the Crown brought a motion to amend its Statement of Defence in order to refer specifically to certain legislative provisions relating to its six-year limitation defence.

[8] During cross-examination, Ms. Sturney acknowledged that she had no involvement in this litigation from 2000 to 2007 and, more specifically, that she was not assigned to argue the case during the time of the amendment application referred to in her affidavit. Ms. Sturney objected to

a number of questions relating to paragraph 12 of her affidavit on the basis that the information was not relevant and was privileged. In reference to her statement in paragraph 12 of her affidavit that she was “advised by my counsel that the Crown believed their existing pleadings were adequate”, Ms. Sturney confirmed that counsel who advised her of that belief consisted of lawyers with Macleod Dixon LLP, who acted as counsel to the Crown as the agents of the Department of Justice.

[9] On April 19, 2011, Ermineskin brought a motion requesting, *inter alia*, a declaration that the Crown had waived solicitor-client privilege by tendering paragraph 12 of the affidavit as evidence in support of the Crown’s 2010 amendment application.

[10] Prothonotary Lafrenière issued the Order on May 17, 2011.

Impugned Decision

[11] In the Order, Prothonotary Lafrenière stated that although solicitor-client privilege is fundamental to our justice system in Canada and must be jealously protected, it may be waived expressly or implicitly in situations where one of the parties makes the communications with counsel an issue in the proceeding.

[12] The Prothonotary’s key finding of fact was that the hearsay statements in paragraph 12 of the affidavit are intended to rationalize the Crown’s delay in amending its statement of defence. Based on this finding, the Prothonotary adopted and made them his, paragraphs 58 and 59 of Ermineskin’s written submissions which read as follows:

Based on these principles, by tendering the affidavit of Ms. Sturney the Crown has waived solicitor-client privilege. Paragraph 12 clearly puts into issue the fact of the Crown having received legal advice, as well as the content of that advice, in regards to both the adequacy of the limitation defence portion of the pleadings and the reason for pursuing an amendment of its pleadings in 2005. Through this affidavit, the Crown seeks to rely on its “belief” in the adequacy of its pleadings, a belief that necessarily arises from the legal advice received from the Crown’s legal counsel, to explain its extraordinary delay in seeking to amend its Statement of Defence.

Despite this reliance, the Crown has objected to the disclosure of the communications that would indicate the context of the legal advice received by the Crown in respect to the assessment of its pleadings, when that advice was received, as well as what, if anything occurred to cause the Crown to change its assessment that its pleadings were adequate. By these objections, the Crown seeks to waive privilege only insofar as it is beneficial to its position, without revealing information. This approach is incompatible with the principles of fairness and inconsistency.

[13] The Prothonotary concluded that the Crown waived solicitor-client privilege in relation to communications between the Crown and its legal advisors which bear upon paragraph 12 the affidavit and the Crown’s belief when it brought its 2004 amendment application with respect to whether its existing pleadings were adequate. He ordered Ms. Sturney to produce all documents in her power, possession or control in relation to communications over which privilege had been waived and finally, ordered Ms. Sturney to re-attend for the purpose of cross examination on her affidavit sworn December 22, 2010.

Issues

[14] The issues here are:

- a. What is the proper standard of review to be applied in this appeal?

- b. Was the order waiving solicitor-client privilege vital to the final issue in the case?
- c. Was the Prothonotary's decision to waive the solicitor-client privilege clearly wrong as being based upon a misapprehension of the facts or upon a wrong principle of law?

Relevant Legislation

[15] The guiding principles of appeals of prothonotaries' orders are found at Rule 51:

51. (1) An order of a prothonotary may be appealed by a motion to a judge of the Federal Court.

(2) Notice of the motion shall be served and filed within 10 days after the day on which the order under appeal was made and at least four days before the day fixed for the hearing of the motion.

51. (1) L'ordonnance du protonotaire peut être portée en appel par voie de requête présentée à un juge de la Cour fédérale.

(2) L'avis de la requête est signifié et déposé dans les 10 jours suivant la date de l'ordonnance frappée d'appel et au moins quatre jours avant la date prévue pour l'audition de la requête.

a. What is the proper standard of review to be applied in this appeal?

Crown's Arguments

[16] The Crown submits that the Order is reviewable *de novo* as a nondiscretionary matter, and relies on paragraph 11 of *Environmental Defence Canada v Canada (Minister of Fisheries and Oceans)*, [2009] FCJ No 182 [*Environmental Defence Canada*], where the Court proceeded based on the parties' agreement that the "determination as to whether the redacted passage is subject to solicitor- client privilege is hardly a discretionary matter".

[17] Nevertheless, if discretionary, the Crown contends that the Order meets the test for a *de novo* review of a discretionary decision of a prothonotary as it is based upon either a wrong principle or a misapprehension of facts (*Canada v Aqua-Gem Investments Ltd*, [1993] 2 FC 425 (Fed CA) at para 95).

Ermineskin's Arguments

[18] Ermineskin's position is that the Order is discretionary, as solicitor-client privilege can be waived expressly or by implication. Even if this is not a discretion that should be exercised lightly, or without proper apprehension of legal principles affording protection for privileged communications, it is nonetheless a discretionary matter. It argues that the Crown failed to provide case law which demonstrates that the Order is "non discretionary" and erroneously relied on *Environmental Defence Canada*. Ermineskin further cites *Universal Sales Ltd v Edinburgh Assurance Co*, [2009] FCJ No 195 [*Universal Sales, Ltd*], where Mr. Justice Russell dismissed the submission that a prothonotary's decision as to whether privilege had been waived should be reviewed on a correctness standard rather than on the "clearly wrong" standard and held that he was required to follow the later standard set forth in *Merck & Co v Apotex Inc*, [2003] FCJ No 1925 [*Merck* 2003]. The respondents conclude that a *de novo* review can only be justified if the Crown can demonstrate that the Order was "clearly wrong" in a sense that the exercise of discretion by the Prothonotary was based either upon a misapprehension of the facts or upon a wrong principle, including an error of law.

Analysis

[19] The Court is of the view that the Crown failed to provide a clear explanation as to why the Order waiving solicitor-client privilege is non-discretionary. The Supreme Court of Canada

canvassed the solicitor-client privilege in *R v McClure*, [2001] SCJ No 13, 2001 SCC 14 at para 34 [*McClure*], and articulated that “[d]espite its importance, solicitor-client privilege is not absolute. It is subject to exceptions in certain circumstances.” Therefore, it is left to the discretion of the Prothonotary to decide whether solicitor-client privilege falls within such circumstances and thus, is a discretionary matter.

[20] The standard of review of decisions of a prothonotary is set forth in *Merck* 2003 at para 19. A discretionary order of prothonotaries ought not to be disturbed on appeal to a judge of this Court unless: (a) the question raised in the motion is vital to the final issue of the case, or (b) the order is clearly wrong, in the sense that the exercise of discretion by the Prothonotary was based upon a wrong principle or upon a misapprehensions of the facts. The appeal is to be heard by this Court *de novo* if either prong of the test is met.

[21] The Federal Court of Appeal recently discussed the standard of review in *Bristol-Myers Squibb Co v Apotex Inc*, [2011] FCJ No 147, and articulated that the ordinary standard of review should apply to appeals from decisions of prothonotaries.

[22] As a result, the Court shall not intervene unless the parties can show that the question raised is vital to the final issue of the case or that the Prothonotary was clearly wrong or based his decision on a wrong principle or on a misapprehension of the facts.

b. Was the Order waiving solicitor-client privilege vital to the final issue in the case?

Crown's Arguments

[23] The Crown in its oral submissions agrees that the Order is not vital to the final issue.

Ermineskin's Arguments

[24] The question of whether a party has waived solicitor-client privilege, according to Ermineskin, is “not vital to the final issue of the case” (*Merck & Co v Apotex Inc*, 2008 FC 1121 at para 10 [*Merck* 2008]; *Universal Sales, Ltd* at para 17). The respondents submit that while the ultimate determination of whether to allow the Crown to amend its pleadings may or may not be “vital”, the determination of which documents Ermineskin may access in concluding a cross examination of Ms. Sturney is clearly not “vital”.

Analysis

[25] The Court agrees with the parties that an order waiving the solicitor-client privilege is not vital to the final issue of a case. An order of this nature stands in contrast to an order striking a cause of action. The Court notes that in *Merck* 2008, Mr. Justice O’Keefe also concluded that an order waiving privilege did not raise a question of vital importance to the final issue of the case.

[26] Therefore, the only way this appeal can succeed is if this Court finds that the Prothonotary was clearly wrong in the exercise of his discretion or clearly misapprehended the facts.

c. Was the Prothonotary’s decision to waive the solicitor-client privilege clearly wrong as being based upon a misapprehension of the facts or upon a wrong principle of law?

Crown's Arguments

[27] The Crown argues that the Prothonotary misapprehended the facts in accepting Ermineskin's submissions that paragraph 12 of the affidavit "was intended to rationalize" the Crown's delay in seeking to amend its statement of defence. The Crown underscores that paragraph 12 of the affidavit provides only background information to describe the context of the 2004 amendment application, and it has no intention of relying on it to explain its delay in seeking to amend its statement of defence.

[28] The Crown submits that its belief in 2004 regarding the adequacy of its existing pleadings is irrelevant. The fundamental premise of its position on the 2010 amendment application is that it is entitled to the amendments because it will serve to determine the real question in controversy and because there is no serious prejudice to the respondents (*Canderel Ltd v Canada* (CA), [1994] 1 FC 3 at para 10 [*Canderel*]; *Dené Tha' First Nation v Canada (Attorney General)*, [2008] FCJ No 847 at paras 8, 13, 15 [*Dené Tha'*]).

[29] The Crown contends that the Prothonotary's waiver of solicitor-client privilege constitutes an error of law. It argues that the Court will not lightly penetrate the shield of solicitor-client privilege relying upon a unilateral assertion of an issue by an adverse party (*Talisman Energy Inc v Petro-Canada Inc*, [2000] AJ No 274 at para 34 [*Talisman*]; *Ed Miller Sales & Rentals Ltd v Caterpillar Tractor Co*, [1992] 5 WWR 531 at para 22 [*Ed Miller Sales*]). The Crown submits that the Prothonotary based his finding on the issue of delay, which has unilaterally been raised by Ermineskin, and will only become a relevant consideration for the Court to the extent that the delay

results in prejudice of a kind that cannot be compensated by costs (*Canderel* at para 10; *Dené Tha'* at paras 8, 13, 15.)

[30] The Crown further states that solicitor-client privilege will only be waived where the client makes a positive assertion which puts his or her state of mind “in issue”, for instance, where one party seeks to rely on legal advice it has received in order to justify a course of conduct (*Stuart Olson Construction Inc v Sawbridge Plaza Corp*, [1995] AJ No 953 at para 24; *Fraser v Houston*, [2002] BCJ No 2204 at paras 22-24 [*Fraser*]; *Talisman* at paras 27, 33, 35).

[31] Moreover, the Crown urges that where legal advice is referred to for context and is not relied upon by a party, solicitor-client privilege has not been waived. It is of the view that an affidavit containing an express reference to receiving the advice of legal counsel does not constitute a waiver of solicitor-client privilege. The Alberta Court of Queen’s Bench found at paragraph 23 of *Talisman*, that a direct reference to legal advice in a pleading or evidence to the fact legal advice was obtained does not necessarily constitute a waiver of solicitor-client privilege.

[32] Finally, the Crown contends that Ermineskin’s reliance on *Cheung v 518402 BC Ltd*, [1999] BCJ No 2415, was misplaced, arguing that in the present case the affidavit does not attest to the substance of any communications exchanged between the Crown and its counsel. More fundamentally, the Crown rejects the argument that it provided paragraph 12 for the purpose of relying on evidence of communications between the Crown and its counsel, and then subsequently retracted its reliance. As such, it submits that it is not relying and has not previously relied on evidence relating to the adequacy of its pleadings as the basis for its 2010 amendment application.

Ermineskin's Arguments

[33] Ermineskin's position is that, on the basis of the record and applicable legal authority, it was open to the Prothonotary to find that paragraph 12 was intended to rationalize the Crown's delay in seeking to amend its pleadings. While the Crown has asserted that it does not have the intention of relying on paragraph 12 to explain its delay in seeking to amend its pleadings, the fact remains that it chose to tender the affidavit. Eventually, the Prothonotary will hear and decide upon the 2010 amendment application and he should be granted deference in ordering further document production and cross-examination on affidavits. As such, an explanation for the Crown's delay in seeking to amend its statement of defence may be relevant to the determination of whether an amendment should be permitted (*Merck & Co Inc v Apotex Inc*, [2004] 2 FCR 459 at paras 29-34 [*Merck* 2004]; *Canderel* at paras 12-13). Ermineskin submits that it is in these circumstances that the Prothonotary made a finding that paragraph 12 of the affidavit was intended to rationalize the Crown's delay.

[34] Ermineskin contends that fairness and consistency require full disclosure of otherwise privileged communications to allow them to fully exercise its rights of cross-examination in light of the Crown's reliance on the state of its legal advice up to 2004 (*Genecor International, Inc v Canada (Commissioner of Patents)*, [2007] FCJ No 385 at para 26. As such, Ermineskin relies on *Castlemore Marketing Inc v Intercontinental Trade and Finance Corp*, [1996] FCJ No. 201 at para 1, where it was held that an affiant is required to answer questions on "any matter relevant to the determination of the issue in respect of which the affidavit was filed."

[35] Moreover, Ermineskin is of the view that the Crown did not identify a specific error of law, but rather allege that the Prothonotary was "clearly wrong" in determining that solicitor-client

privilege could be waived in the absence of a positive assertion that would put the Crown's state of mind "in issue." However, they submit that the Crown voluntarily injected its state of mind into this application by adducing the affidavit into evidence.

[36] Ermineskin adds that a party may be taken to have waived its right to solicitor-client privilege in relation to certain communication normally afforded that privilege where that party either expressly or impliedly waives such privilege. They rely on the British Columbia Supreme Court decision *Fraser*, for their argument. In that case, the Court held at paragraph 22:

1. Solicitor-client privilege should be interfered with only to the extent necessary to achieve a just result: *Descoteaux v Mierzwinski*, [1982] 1 SCR 860.

2. Waiver of solicitor-client privilege may occur in the absence of an intention to waive, where fairness and consistency so require. Waiver of privilege as to part of a communication will be held to be waiver as to the entire communication. Similarly, where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advice is lost: *S & K Processors Ltd v Campbell Ave Herring Producers Ltd*, [1983] BCJ 1499.

3. A party will waive the protection of solicitor-client privilege when it voluntarily injects into the proceeding the question of its state of mind, and, in doing so, uses as a reason for its conduct the legal advice that it has received: *Morrison (supra)*.

4. To displace solicitor-client privilege there must be an affirmative allegation which puts the party's state of mind in issue: *Pax Management Ltd v CIBC* (1987), 14 BCLR (2d) 257 (BCCA).

[37] Ermineskin further relies on Madam Justice McLachlin's (as she then was) characterization of the waiver of solicitor-client privilege in *S & K Processors Ltd v Campbell Ave Herring Producers Ltd*, [1983] BCJ No1499 [*S & K*], stating that "the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the

privilege at least to a limited extent. The law then says that in fairness and consistency, it must be entirely waived.”

[38] They contend that *Merck* 2004, at paras 16 and 45, makes clear that the Crown cannot “pick and choose” what evidence it will waive privilege over. Instead, “privilege is lost over any communication that has a relevant and material connection to the issue brought forward” (*Iozzo v Weir*, [2004] AJ No 395 at para 26. In hearing the 2010 amendment application, the Prothonotary is entitled to consider all evidence before the Court, including the Crown’s statement that it believed its “existing pleadings were adequate”, which may be held to explain its delay.

[39] Finally, *Ermineskin* underscores that the Crown’s reliance on *Talisman* is misplaced, arguing that it is not binding on the Federal Court and that, in any event, it stands for the proposition that in exercising its discretion to order discovery of privileged documents, the Court must determine whether the legal advice offered by the waiving party is relevant to such a degree that privilege is waived over the entirety of the communications. *Ermineskin* argues that the Crown’s delay in seeking to amend its pleadings is relevant to the application before the Court and thus, the evidence relating to the Crown’s assertion, through the affidavit, that this delay was based on its belief in the adequacy of its pleadings up until 2004, is also relevant.

Analysis

[40] The main issue before the Court is whether Prothonotary Lafrenière’s Order regarding the waiver of solicitor-client privilege was clearly wrong as being based upon a misapprehension of facts or upon a wrong principle of law.

Finding of Facts

[41] The Court cannot find that the Prothonotary misapprehended the facts, based on Ermineskin's submissions that paragraphed 12 of the affidavit "intended to rationalize" the Crown's delay in seeking to amend its statement of defence. The Court reiterates that the Crown delivered a notice of motion on December 23, 2010, seeking an order allowing amendments to its statement of defence to include an express reference to various statutes. The affidavit was submitted in the Crown's Motion Record in support of its 2010 application amendment.

[42] The Court is of the view that, on the basis of the record and the parties' submissions, the Prothonotary did not err in finding that paragraph 12 of the affidavit was intended to rationalize the Crown's delay in seeking to amend its statement of defence in 2004. The Court accepts Ermineskin's position that there is an explicit reference to legal advice to be found in paragraph 12 of the affidavit and, to a lesser extent, in Ms. Sturney's cross-examination. Accordingly, the Court is unable to agree with the Crown that paragraph 12 of the affidavit solely provides only background information to describe the context of the 2004 amendment application.

[43] Moreover, the Crown's submissions that paragraph 12 of the affidavit is irrelevant to its 2010 amendment application is without foundation. The affidavit was submitted in the Crown's Motion Record in support of the 2010 amendment application. The Prothonotary will hear the 2010 amendment application and, as such, the explanation for the Crown's delay in seeking to amend its statement of defence is a relevant factor to the determination of whether an amendment should be permitted or not. The Federal Court of Appeal in *Merck* 2004, cited *Continental Bank Leasing Corp v Canada*, [1993] 1 CTC 2306 (TCC) with respect to the factors that the Court must consider to

permit or deny amendments of pleadings, including “[...] the timeliness of the motion to amend or withdraw [...]”.

[44] In such circumstances, the Court must agree that the Prothonotary did not misapprehend the facts in finding that paragraph 12 of the affidavit was intended to rationalize the Crown’s delay in seeking to amend its statement of defence.

Waiver of Solicitor-client Privilege

[45] The basic principles underlying the concept of solicitor-client privilege are not in dispute. It is common knowledge that the Supreme Court has repeatedly said that it recognized solicitor-client privilege as fundamental to the Canadian legal system (*McClure*). As stated in a recent decision by the Federal Court of Appeal, the protection of the confidentiality of legal advice communicated by lawyers to their clients is of fundamental importance to the administration of justice. Incursions must be kept to an absolute minimum (*Canada (Attorney General) v Quadrini*, [2011] FCJ No 475 at para 29).

[46] In paragraph 26 of *Environmental Defence Canada*, the Federal Court stated that a waiver of solicitor-client privilege is established when it is demonstrated that the possessor of the privilege knows of the existence of the privilege and voluntarily evinces an intention to waive it (*KF Evans Ltd v Canada (Minister of Foreign Affairs)*, [1996] FCJ No 30 at para 16). There may also be waiver by implication. The concept of implied waiver is addressed in Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 3d ed (Toronto: LexisNexis Canada Inc, 2009) at 959:

As to what constitutes waiver by implication, Wigmore said:

Judicial decision gives no clear answer to this question. In deciding it, regard must be had to the double elements that are predicated in every waiver, i.e. not only the element of implied intention, but also the element of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must remain final [emphasis added].

[47] As recently confirmed by this Court in *Mahjoub (Re)*, [2011] FCJ No 1125 at para 10, the jurisprudence supports the following propositions relating to implied waiver of the privilege:

- (a) waiver of privilege as to part of a communication will be held to be waiver as to the entire communication. *S & K Processors Ltd v Campbell Ave Herring Producers Ltd*, [1983] BCJ 1499, *S & K*;
- (b) where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advice is lost. (*S & K*);
- (c) in cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent. The law then says that in fairness and consistency, it must be entirely waived. (*S & K*) [My emphasis];
- (d) the privilege will be deemed to have been waived where the interests of fairness and consistency so dictate or when a communication between a solicitor and client is legitimately brought into issue in an action. *Bank Leu Ag v Gaming Lottery Corp*, [1999] OJ 3949 (Lexis); (1999), 43 CPC (4th) 73 (Ont SC) at paragraph 5;
- (e) the onus of establishing the waiver rests on the party asserting waiver of the privilege. (*S & K* at paragraph 10).

[48] In *Apotex Inc v Canada (Minister of Health)*, [2004] 2 FCR 137, Mr. Justice Lemieux concluded that fairness to a party is a guiding principle when determining whether solicitor-client privilege is deemed to have been waived. Balancing that element of fairness against the values underlying the privilege depends on the circumstances.

[49] Guided by these principles, the Court must turn to the circumstances in this matter. In the Court's view, paragraph 12 of the affidavit is about injecting in the process the Crown's legal advice as an element to explain its delay in seeking amendments to its statement of defence. Following Sopinka, Lederman & Bryant's unequivocal statement that "[t]here is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not," the Crown cannot be allowed, after disclosing relying on legal advice to determine the adequacy of its pleadings, to withhold communications between the Crown and its legal advisors which bear upon paragraph 12 of the affidavit.

[50] The Crown's position is that the affidavit refers only to the fact of receiving legal advice and not the content of that advice, based on *Talisman* and *Ed Miller Sales*. The Court cannot agree that this is the situation in the present case. *Talisman* further holds, at para 27, that waiver is triggered by demonstrating reliance on legal advice for the resolution of an issue, not by the mere reference to having received it. As such, paragraph 12 of the affidavit asserts that the Crown relied on legal advice in regards to the adequacy of the limitation defence portion of the pleadings and the reason for pursuing an amendment of its pleadings. Accordingly, based on the sound principle in *S & K*,

as the Crown relied on legal advice as an element of its claim, the privilege which would otherwise attach to that advice is lost.

[51] It is not open to the Crown to assert that there was no implied waiver because its pleadings do not rely on the legal advice contained in the affidavit. The Court rejects that argument, as it was also dismissed by this Court in paragraph 32 of *Environmental Defence Canada*, and held that “reliance is not, in or itself, determinative of the issue of implied waiver.” Therefore, there is nothing clearly wrong about Prothonotary Lafrenière’s conclusion that “based on these principles, by tendering the affidavit of Ms. Sturney the Crown has waived solicitor-client privilege.”

[52] In closing, the Court must note that, as held by Prothonotary Lafrenière, the communication at issue in paragraph 12 of the affidavit relates to the applicants’ belief in 2004 and not to any subsequent communication or legal advice. As such, there was only partial waiver by the Crown, limited to the considerations back in 2004.

[53] In answering the second question, the Court agrees with the parties that Prothonotary Lafrenière’s Order fails to raise an issue vital to the final outcome of the case. Answering the third question, the Court also finds that the Prothonotary did not commit any error in the exercise of his discretion or base his discretion on any misapprehension of facts.

[54] The parties agreed that no costs should be awarded.

JUDGMENT

THIS COURT ORDERS that:

1. The appeal be dismissed.
2. No costs are awarded.

“Michel Beaudry”

Judge

Federal Court



Cour fédérale

FEDERAL COURT**SOLICITORS OF RECORD**

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